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**SELECTED QUESTIONS OF BURDEN-SHARING IN INTERNATIONAL
REFUGEE LAW**

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ABSTRACT

The number of refugees worldwide has never been higher, with an estimate of 65.3 million forcibly displaced persons by the end of 2015. The brunt of the material, economic and social burdens these waves of often destitute persons represent is borne by a minority of close-proximity States, ill-equipped to handle mass influxes of people in dire need of protection and assistance. This dissertation explores the legal obligations of States to share the burden of international refugees, through four select research questions. Firstly, the existence of universal and regional obligations to burden-share are examined. Secondly, the legality of the ‘third safe country’ notion is examined under international law. Thirdly, the economic responsibilities of refugee-generating States towards refugees, asylum States and the UNHCR is examined. Fourthly, the obligations of States to rescue asylum seekers in distress at sea, and to process their asylum claims is examined. The fundamental observation of the dissertation is that although the 1951 Convention provides a generous set of rights to persecuted persons, its primary shortcoming in the context of this dissertation, is the lack of a clear and positive obligation, ensuring a fair distribution of the burdens of refugees between the signatory States. However, regional efforts do, to a degree, mitigate this issue by establishing obligations which seek to distribute the costs and burdens of refugees.

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List of abbreviations

ACHR – American Convention on Human Rights

ACP – African and Caribbean Partner States

AMIF – Asylum, Migration and Integration Fund

APD – Asylum Procedures Directive

CAT – Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CFREU – Charter of Fundamental Rights of the European Union

Charter – United Nations Charter

DPILCR – Declaration of Principles of International Law on Compensation to Refugees

ECHR – European Convention on Human Rights

ECJ – European Court of Justice

ECtHR – European Court of Human Rights

ERF - European Refugee Fund

EU – European Union

ExCom – Executive Committee

GA – General Assembly

IACHR – Inter-American Court of Human Rights

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

ILC – International Law Commission

IMO – International Maritime Organization

OAS – Organization of American States

OAU – Organization of African Unity

PCIJ – Permanent Court of International Justice

SOLAS – International Convention on the Safety of Life at Sea

SAR – International Convention on Maritime Search and Rescue

TFEU – Treaty on the Functioning of the European Union UDHR

UN – United Nations

UNCLOS – United Nations Convention on the International Law of the Sea

UNGA – United Nations General Assembly

UNHCR – United Nations High Commissioner for Refugees

UNSC – United Nations Security Council

VCLT – Vienna Convention on the Law of Treaties

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CHAPTER 1

I INTRODUCTION

While refugees are not a modern phenomenon, it was only in the nineteenth century that their legal status came to be of international relevance, when treaties regulating non-extradition of political offenders were ratified.¹ The earliest international legal instruments regulating the status of refugees were case-specific and limited to particular ethnic categories of refugees.² The office of the United Nations High Commissioner for Refugees (UNHCR) was established by the United Nations General Assembly (UNGA) in 1950, and The United Nations 1951 Convention Relating to the Status of Refugees³ (1951 Convention) was adopted the following year, with the specific situation of European post-World War II refugees in mind. Today, more than 65 years after the 1951 Convention entered into force, it remains the primary international legal instrument relating to the protection of refugees — although it is regulating a wholly different and more complex global situation than the one it was originally intended to mitigate.

The 1951 Convention was drafted in the wake of the Second World War, which left behind a Europe in ruins, with a vast number of forcibly displaced persons.⁴ It was recognised by the drafters that the protection of displaced persons could not simply be achieved by repatriating refugees to the allied-controlled areas they originated from. This recognition is evidenced by the relatively generous rights afforded refugees in the Convention.

An example of the perceived need of the time to protect refugees is found in Article 33 (1) of the 1951 Convention. The Article places a positive legal obligation on the signatory States to respect the principle of *non-refoulement* — hence not to ‘expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of

¹ Agnes Hurwitz *The Collective Responsibility of States to Protect Refugees* (2009) 10.

² Ibid.

³ United Nations, General Assembly *Convention Relating to the Status of Refugees* 28 July 1951, 189 UNTS 137.

⁴ More than 2.2 million Germans were expelled from Czechoslovakia after World War II, see Bernard Wasserstein ‘European Refugee Movements After World War Two’ *BBC* 17 February 2011, available at http://www.bbc.co.uk/history/worldwars/wwtwo/refugees_01.shtml, accessed on 20 April 2017.

territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’⁵

While the 1951 Convention afford refugees both protection and a selection of basic rights, the Convention offers limited support in deciphering whether the signatory States are legally obliged to assist each other with the financial and socio-political burdens of receiving refugees. Nonetheless, this aspect of the international protection of refugees was not simply overlooked by the drafters. Based on its experience with refugees after the Spanish Civil War (1936-1939), France suggested a provision in the Preamble to the 1951 Convention that would acknowledge the extraordinary burden often inflicted on receiving States. The provision was, after objections leading to several amendments,⁶ unanimously accepted by the Conference of Plenipotentiaries:

[C]onsidering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.⁷

The provision expresses a clear recognition of the burden which the granting of asylum to refugees signify to the asylum State. Importantly, the provision recognises this burden as an international problem, which in turn demands an international solution through cooperation.

However, the original provision suggested by France was significantly more specific, and placed substantial importance on burden-sharing, while recognising the consequences that geographical location may wreak on close-proximity States:

[C]onsidering that the exercise of the right of asylum places an undue burden on certain countries *because of their geographical situation*, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved without international co-operation *to help to distribute refugees throughout the world*.⁸ (Emphasis added).

⁵ 1951 Convention supra (n3) Article 1 (A) (2).

⁶ Marjoleine Zieck “Quota Refugees”: The Dutch Contribution to Global “Burden Sharing” by Means of Resettlement of Refugees’ (2011) *International Journal of Legal Info*, Vol. 39 130-163 at 137.

⁷ 1951 Convention supra (n3) Preamble, para. 4.

⁸ UN Doc E/L.81, 29 July 1950, Rochefort, France.

While the original provision was remarkably clear in pinpointing central issues of distribution of cost and responsibility, the current wording only provides a vague sense of moral duty to take on a portion of the cost of international refugees. Even so, the final wording make for a stark contrast to the reality of burden-sharing in the refugee regime of today,⁹ as States scramble to avoid both costs and responsibilities.

The European management of the international refugee crisis was, already 20 years ago, compared to the classic prisoner's dilemma.¹⁰ Applied to the refugee situation, a State, *in lieu* of positive legal obligations prescribing an equitable distribution of refugees, 'risks being punished for a liberal attitude towards refugee reception.'¹¹ The punishment stems from the reluctance of other States to receive or contribute to the reception of refugees, which in turn forces States with liberal asylum-policies to receive a disproportionate number of refugees. If, on the other hand, States were to cooperate in a transparent and equitable manner, the crisis of today would arguably be more predictable and less overwhelming. This would benefit both asylum States and refugees.

II RESEARCH CONTEXT

The number of refugees worldwide has never been higher, with an estimate of 65.3 million forcibly displaced persons by the end of 2015.¹² At the same time, the brunt of the material, economic and social burdens these waves of often destitute persons represent is borne by a minority of close-proximity States, ill-equipped to handle mass influxes¹³ of people in dire need of protection and assistance.¹⁴

⁹ Although the word 'burden' does not have the most sympathetic ring to it, refugees do at least in a short-term perspective, represent significant financial costs for the receiving State.

¹⁰ Gregor Noll 'Prisoners' Dilemma in Fortress Europe' (1997) 40 GYIL 405-437.

¹¹ Ibid at 411.

¹² UNHCR 'Global Trends: Forced Displacement in 2015' available at <http://www.unhcr.org/576408cd7.pdf>, accessed on 2 May 2017.

¹³ The ExCom Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations No. 100 (LV) – 2004 (GA document A/AC.96/1003) defines a 'mass influx' as a situation comprised of some or more of the following characteristics: '(i) considerable numbers of people arriving over an international border; (ii) a rapid rate or arrival, (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers.'

¹⁴ UNHCR estimates that 84 per cent of the world's refugees are hosted in developing regions, see UNHCR 'Global Trends: Forced Displacement in 2016' at 2, available at <http://www.unhcr.org/statistics/unhcrstats/5943e8a34/global-trends-forced-displacement-2016.html>, accessed on 10 June 2017.

The current European refugee-crisis, labelled as such due to the massive, recent influxes of asylum seekers to Europe, is indeed of record proportions, with more than twice the number of refugees in Europe than after the fall of the Berlin Wall.¹⁵ Nevertheless, the legal responsibilities and obligations of States to provide protection for refugees is still primarily depending on the 1951 Convention and its appending Protocol of 1967.¹⁶ While the 1951 Convention affords the refugee a set of rights upon arrival in the asylum State, the Convention is silent on the aspects of economics, security, and stability of the receiving State — all core aspects of States behaviour in the current crisis.¹⁷ As asylum seekers move towards Europe, European countries experience a surge in right-wing populist policy.¹⁸ Meanwhile, States perceived as benign asylum destinations scramble to avoid the increasing costs of protection, through the adoption of policies which purpose is to make themselves look less attractive to asylum seekers.¹⁹ Thus, as the title of this paper suggests, this scenario promotes a sordid game of musical chairs, where States rush to adopt repelling policies, in turn forcing asylum seekers to play the same game, however involuntary. When the dismantling of national refugee protection mechanisms becomes a measure of defence against consequences of mass influx, the inadequacy of the 1951 Convention in modern times becomes apparent, and the obligations of States to share and distribute the burdens of refugees grows in importance.

¹⁵ See Phillip Connor 'Number of Refugees to Europe Surges to Record 1.3 Million in 2015' *Pew Research Center* 2 August 2016, available at <http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/>, accessed on 2 May 2016.

¹⁶ United Nations, General Assembly *Protocol Relating to the Status of Refugees* 31 January 1967, 606 UNTS 267.

¹⁷ According to the Fiscal Council of Sweden, the estimated average annual cost per refugee starts at above €14 000 for the first year of asylum. See OECD *Migration Policy Debates No. 13* January 2017 at 6, available at: <https://www.oecd.org/els/mig/migration-policy-debates-13.pdf>, accessed on 2 May 2017.

¹⁸ At the time of writing, Austria's FPÖ, a party promoting anti-immigration policies, is polling around at nearly 20 per cent. In Hungary, the governing party Fidesz is increasing anti-immigration rhetoric. See Thomas Greven 'Right-Wing Populism and Authoritarian Nationalism in the U.S. and Europe' *Friedrich Ebert Stiftung* 3 May 2017 at 3, available at <http://library.fes.de/pdf-files/id/13395.pdf>, accessed on 2 May 2017.

¹⁹ Thomas Gammeltoft-Hansen & Helle Malmvig 'The Ugly Duckling: Denmark's Anti-Refugee Policies and Europe's Race to the Bottom' *Huffington Post* 4 May 2016, available at http://www.huffingtonpost.com/thomas-gammeltoft-hansen/denmark-refugee-europe_b_9574538.html, accessed on 5 April 2017.

III THE AIM OF THE DISSERTATION AND THE RESEARCH QUESTIONS

After the First World War and a typhus epidemic in Poland demanded international cooperation, it was timely noted by Schwarzenberger that '[n]o compulsion exists for a State to join in any such cooperative effort. It is its own self-interest which prompts it to do so.'²⁰ This paper aims to clarify the limits of the legal obligations of States to share the burden of refugees, and will in doing so examine whether the near-century old observation noted above still holds true.

While the overwhelming majority of refugees today are situated in the global south, wealthy northern States close their borders²¹ and decrease financial contributions which might prevent further migratory flows.²² The unsustainable situation of the current refugee crisis, as well as the rapid increase in forcibly displaced persons,²³ make this dissertation particularly pertinent as it will examine the obligations of States to share the material and socio-political burdens of refugees. The concepts of State sovereignty and State responsibility will be explored to create the necessary backdrop for the discussion of the legal obligation to share the burden of international refugees. Central provisions of the 1951 Convention will be objects of thorough examination. Due to the reluctance of States to assume financial responsibilities of unknown proportions, the relevant treaties are expected to provide an insufficient basis for the claim of a common, international obligation to share the burden of international refugees. Accordingly, customary international law will play an important role in this paper.

The main research question is whether international law obliges States to contribute to the mitigation of the refugee-crisis in an equitable manner. This question will be examined through a selection of relevant sub-questions, which all flow from this overarching research problem.

²⁰ Guy S Goodwin-Gil & Jane McAdam *The Refugee in International Law* 3ed (2007) 502.

²¹ As of March 2016, five south-eastern European countries have closed their borders. See Aamna Mohdin 'No Entry' *Quartz* 10 March 2016, available at <https://qz.com/635110/these-are-the-routes-being-closed-off-to-refugees-fleeing-into-europe/>, accessed on 18 April 2017.

²² Scandinavian countries are reported to drastically cut their foreign aid contributions as domestic refugee-aid spending increases. See Adam Moe Fejerskov and Niels Keijzer 'Why Slashing Foreign Aid in Europe to Pay for Refugees Won't Help Solve the Long-Term Crisis' *Huffington Post* 23 December 2015, available at http://www.huffingtonpost.com/adam-moe-fejerskov/foreign-aid-europe-refugee-crisis_b_8869794.html, accessed on 2 July 2017.

²³ UNHCR op cit (n14) 2.

The minor research questions are as follows:

- Is the ‘third safe country’ concept legal under international law, and if so, under what limitations?
- Can refugee-producing States be held financially responsible for the cost inflicted on the individual refugee, the UNHCR and the States that receive refugees?
- What obligations rest with States to rescue asylum seekers in distress at sea, and who bears the responsibility of processing and protecting the applicants once rescued?

IV STATEMENT OF THE PROBLEM

The structural problem-basis for this dissertation becomes evident when one examine the current state of the world’s refugees. Although the influxes of asylum seekers to Europe are substantial²⁴ in comparison to previous influxes of the kind, the clear majority of refugees today are situated in developing nations which lack the resources to cope with both the economic and socio-political consequences of protecting and processing large numbers of asylum seekers.²⁵

This further entrenches the populations of these regions in poverty and social disruptions, laying stones to the burden of nations that are already struggling. For example, 91 per cent of Lebanese respondents perceived ‘the threat of Syrian refugees’ as a major security concern for the country in 2014,²⁶ while the Tanzanian government maintained that its hosting of refugees is so costly that it cannot adequately provide for its citizens.²⁷ The reluctance of developed States to share in these burdens clearly represent a moral fallacy — the research problem of this

²⁴ The Statistics bureau of the European Commission, Eurostat, found that about 1.3 million persons claimed asylum in the EU in both 2015 and 2016, amounting to approximately double the number recorded in the EU during the previous relative peak of 1992. See Eurostat ‘Asylum Statistics’ 2017, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics, accessed on 2 August 2017.

²⁵ According to UNHCR, 84 per cent of the refugees under their mandate are hosted in developing regions. UNHCR op cit (n14) at 2.

²⁶ Hovig Wanniss ‘Security Threat Perceptions in Lebanon’ Background Paper, *International Alert* (2014), available at data.unhcr.org/syrianrefugees/download.php?id=8911, accessed on 2 June 2017.

²⁷ Patricia Ongpin ‘Refugees in Tanzania – Asset or Burden?’ (2008) 1 FMR 13-23 at 15.

dissertation is whether this fallacy translates into legal obligations for developed States to contribute in an equal manner.

VI LITERATURE REVIEW

Conventions that will be central items of interpretation are the following: The 1951 Convention relating to the Status of Refugees, the 1970 Convention on Principles of International Law Concerning Friendly Relations and Cooperation among States, the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, and various relevant UN Handbooks and UNHCR Executive Commission Conclusions.

Several of the most prominent scholars of refugee law will be sourced when answers to the research questions of this dissertation are to be sought. Among the general frameworks are Goodwin-Gil & McAdam's staple work *The Refugee in International Law* (2007) and Hathaway's *The Rights of the Refugee under International Law* (2005). While these authors have written extensively on the rights of refugees and the obligations of States to protect them, the coverage of the particular questions of this dissertation is limited, due to their specific nature.

There are, however, articles written by both Goodwin-Gil and Hathaway, as well as other scholars, relating more directly to the subject matter of the research questions. One of the relevant articles is Fonteyne's 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees'; which gave a positive, yet unfortunately incorrect prediction of the present level of burden-sharing in international refugee law. Another central work to this dissertation is Shucks article 'Refugee Burden-Sharing – A Modest Proposal,' which alongside Hathaway & Neve's 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' argues that the sharing of responsibilities among States is necessary for the adequate protection of the world's refugees, while proposing slightly different solutions to how such cooperation should come about. Furthermore, Anker, Fitzpatrick and Shacknove's response to Hathaway, Neve and Shuck's respective articles; 'Crisis and Cure – A reply to Hathaway/Neve and Schuck', provides a relevant critique of the premises which the abovementioned articles are based on. While these articles revolve around the lack of effective burden-

sharing and thus effective protection in the current refugee regime, their contact points to the specific questions of this dissertations are limited. However, the materials listed above provide, in combination, a solid point of departure for further research into the questions of this dissertation.

Finally, other secondary sources such as Hurwitz' *The Collective Responsibility of States to Protect Refugees* (2009); Achiumes 'Syria, Cost sharing and the Responsibility to Protect'; Eggli's 'Mass influx and the Limits of Public International Law'; Barnes' 'Refugee Law at Sea'; Blocher & Gulati 'Competing for Refugees' and Marjoleine Zieck 'Quota Refugees: The Dutch contribution' are all relevant secondary sources providing valuable background information and analyses to be drawn from in both the research for, and the writing of this dissertation.

VII RESEARCH METHODOLOGY

This dissertation will primarily examine and analyse international sources of law to decipher what legal obligations rests with States to share the burden of refugees. These examinations will be undertaken through desktop research. The research questions will require analysis and assessment of treaties, conventions and customary international law. The primary sources of law will thus be the 1951 Convention and 1967 Protocol relating to the Status of Refugees (1967 Protocol). Other international conventions, treaties, and declarations will be drawn from, hereunder the Universal Declaration on Human Rights, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, and the Organization of African Unity 1969 Convention Concerning the Specific Aspects of Refugee Problems in Africa, which are all relevant primary sources of law in this context. Various relevant UN General Assembly Resolutions and Conclusions will also be drawn from. As the primary sources themselves are expected to place limited formal obligations on States in regard to the questions of this dissertation, potential developments of international customary law will have to be examined. For this undertaking, both the abovementioned sources of soft law as well as the literary works of scholars in refugee law will be sourced, alongside relevant international and domestic court decisions.

VIII CHAPTER SYNOPSIS

1 Introduction

The 1951 Convention constitutes the primary international legal framework relating to refugees. This first chapter outlines the research questions and the structure of the dissertation.

2 The obligations of States to share the burden of refugees

Whether States are legally obliged to share the burden of refugees in an equitable manner will be explored in this chapter, by examining the obligations of States to receive refugees through resettlement programs, and to burden-share fiscally.

3 The 'third safe country' notion and the obligation of States to determine the status of asylum seekers

This chapter will examine the legality of the widespread 'safe third country' practices, where States send asylum seekers back to a State the applicant has passed through, deemed safe enough to offer sufficient protection from persecution by the sending State.

4 The obligation of States to cover the cost of generating refugees

The possibility of holding the refugee-creating State liable for financial costs of caring for received refugees is alluring, as it would weaken incentives for States responsible for the creation of refugees, while providing the asylum State with a well-justified contribution to its protection of the fundamental human right of asylum. The question of whether States can, under international law, be held fiscally responsible for their creation of refugees and the cost this inflicts on refugees, asylum States and the UNHCR will be examined in this chapter.

5 The obligation of States to rescue refugees at sea

The obligations of States to rescue asylum seekers in distress at sea, and to allow disembarkation and processing of rescued applicants, are pertinent questions in light of the current European situation. This chapter will examine the question of rescue, as well as those of disembarkation and determination of refugee status.

6 Conclusions

The final chapter will recapitulate the observations of the dissertation, and connect the research questions to burden-sharing in the refugee regime today.

CHAPTER 2: THE OBLIGATIONS OF STATES TO SHARE THE BURDEN OF REFUGEES

I INTRODUCTION

This chapter will explore the main research question; whether States are legally obliged to share the burden of refugees in an equitable manner. The chapter will show how cooperation and burden-sharing are concepts frequently alluded to in international forums, before examining how these concepts are implemented both in global and regional refugee regimes. The chapter will focus on the most common and central aspects of burden-sharing, namely the physical relocation and settlement of refugees in third States through resettlement programs, and contributive fiscal transfers between States.

As indicated in chapter one of this dissertation, the global refugee crisis yields vastly different effects on the world's nations, depending on their geographical location. Four out of six of the top six asylum countries of the world are located in low-income countries in the politically volatile Middle East.²⁸ Meanwhile, the global North is largely sheltered from immediate influxes of asylum seekers due to the sheer physical distance and the hindrance this constitutes to asylum seekers fleeing from the world's conflict zones. However, as asylum seekers migrate towards Europe, the European countries closest to the African continent and the Middle East bear, in the European context, the brunt of the cost resulting from the reception of asylum seekers.

This chapter consists of five subsections. The following section will explore the general duty of States to cooperate and to share the burden of refugees, while the third section will examine the obligation to accept quota refugees. The fourth section will examine some of the existing legal obligations to burden-share fiscally, while the fifth section will summarise the observations of the chapter.

²⁸ Turkey, Pakistan, Lebanon, Iran, Ethiopia, and Uganda are the top six refugee-hosting countries. See UNHCR *op cit* (n12) 3.

II THE DUTY OF STATES TO COOPERATE

The duty of States to cooperate is outlined in the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, which provides that:

States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences.²⁹

This principle of cooperation could easily be applied to international refugee law. Equitable contributions by the individual States to lessen the burdens borne by asylum countries, would clearly be in accordance with both the Declaration mentioned above and the UN Charter.³⁰ However, none of these provisions place positive legal obligations on States to undertake measures to ensure an equitable sharing of the burdens related to refugees.

The 1951 Convention refers in its preamble to the international nature of refugee flows and the need for burden-sharing. However, the preamble does not oblige the signatory States to contribute to the protection of asylum seekers and refugees outside of their territory; neither through fiscal transfers, nor through material aid or resettlement. Rather, the preamble seeks to illuminate the context in which the 1951 Convention is to be interpreted.³¹

Although the legal responsibility for protection, and thus also the costs inferred from receiving asylum seekers remain with first asylum States due to the principle of *non-refoulement*,³² States worldwide endorse the concepts of international solidarity and burden-sharing. Yet contributions largely remain ad-hoc and insufficient.³³

²⁹ United Nations, General Assembly *The Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nation*, 24 October 1970, A/RES/25/2625(XXV) Principle (d): The duty of States to cooperate with one another in accordance with the Charter.

³⁰ A purpose of the United Nations is '[t]o achieve international co-operation in solving international problems of ... humanitarian character...' See United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS 16, Article 1 (3).

³¹ United Nations *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Article 31 (2).

³² 1951 Convention *supra* (n3) Article 33 (1).

³³ James C Hathaway & R Alexander Neve 'Making International Refugee Law Relevant Again – A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *HarvHumRtsJ* 115-211 at 117.

The UNHCR has long stressed the importance of burden-sharing, and in a recent Conclusion of October 2016 the Executive Committee (ExCom), referring to a long list of previous conclusions,³⁴ was

Reaffirming its commitment to international solidarity and responsibility- and burden-sharing involving all members of the international community, and recalling the importance of international cooperation, in particular, to support communities and countries hosting large refugee populations, in ensuring protection and assistance and achieving solutions for refugees.³⁵

Furthermore, the Conclusion maintains that the Committee

Commits to further strengthening of international cooperation and solidarity and equitable responsibility and burden sharing; and further urges all States and UNHCR to increase their efforts to implement these important principles, including through the provision of much needed support to host countries by mobilizing financial and other necessary resources, and ensure protection and assistance and realize durable solutions for refugees and for other persons of concern, as appropriate, in order to enhance the coping ability and resilience of host communities, as well as provide assistance in a more predictable, timely, sustainable and equitable and transparent way.³⁶

According to Hathaway and Foster, ExCom Conclusions must be considered sources of international law, that assist in establishing the purpose and object of the 1951 Convention, in accordance with the Vienna Convention on the Law of Treaties³⁷ (VCLT) Article 31 (3) (a).³⁸ Furthermore, it must be noted that the number of ExCom members is both high and correlative to the parties to the 1951 Convention, and that the Conclusions require agreement between the same signatories of the Convention before adaption. This supports the notion that the ExCom Conclusions contain the interpretations of the signatory States to the 1951 Convention, interpretations which should be heeded when the Convention is applied.³⁹

Accordingly, one could argue that an act to the contrary of the ExCom Conclusions would be incompatible with the principle of good faith as stipulated in

³⁴ UNHCR Executive Committee Conclusion No. 18 (XXXI) 1980, No. 40 (XXXVI) 1985, No. 52 (XXXIX) 1988, No. 56 (XL) 1990, No. 80 (XLVII) 1996, No. 67 (XLII) 1991, No. 100 (LV) 2004, No. 101 (LV) 2004, No. 104 (LVI) 2005, No. 105 (LVII) 2006 para (i), No. 107 (LVIII) 2007, para (b) (xiii), No. 109 (LX) 2009, No. 111 (LXIV) 2013, and No. 91 (LII) 2001.

³⁵ UNHCR Executive Committee Conclusion No. 112 (LXVII) 2016.

³⁶ Ibid.

³⁷ Vienna Convention *supra* (n31).

³⁸ Alex Catalán Flores ‘Reconceiving “Burden-sharing” in international refugee law’ (2016) *King’s Student Law Review*, Vol. 7 40-51 at 41.

³⁹ See ‘Draft Articles on the Law of Treaties with commentaries’ (1966) 2 *UNYBILC* 187 A/CN.4/SER.A/1966/Add.1 at 221.

the UN Charter,⁴⁰ seeing as the ExCom members have agreed to the interpretations laid down in their Conclusions. As held by the International Court of Justice (ICJ) in the *Case of Certain Norwegian Loans*, ‘...the obligation to act in accordance with good faith, being a general principle of law, is also part of international law.’⁴¹ While a lack of good faith in the implementation of a treaty must be differentiated from a violation of the treaty itself, an act committed by a member of the ExCom which derogates from the Conclusions, would nonetheless constitute a breach of international law. Furthermore, the UN General Assembly has consistently expressed its support for these principles in its resolutions on the Office of the UNHCR.⁴² The stance of the international authorities is thus apparent, and yet, a clear legal obligation is lacking.

As established in this section, there is no legal, universal obligation on States to aid one another with the burdens of refugees. The following section will examine the concept of resettlement, and whether States are obliged to receive refugees through such schemes.

III QUOTA REFUGEES

Also referred to as resettlement refugees, quota refugees are the refugees who are comparably fortunate enough to be resettled in a safe third country, thus cutting short the perilous journey most refugees undertake to reach their desired country of asylum. While providing the individual refugee with a safe place to rebuild her life, resettlement does simultaneously alleviate the first asylum State of the socioeconomic burden the refugee represented to it. In 2015, the UNHCR submitted 134 000 applications for refugees to States for resettlement, of which 107 100 were resettled in third countries.⁴³ This constitutes a mere 3.3 per cent of the total number of asylum seekers worldwide;⁴⁴ a stark reminder of how the quota-system only resettles a fraction of the total number of persecuted persons.

⁴⁰ The UN Charter Supra (n30) Article 2 (2) demands that ‘All members ... shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.’

⁴¹ *Case of Certain Norwegian Loans (France v Norway)* 1957 ICJ Reports 9 at 53.

⁴² Hurwitz op cit (n1) 143.

⁴³ UNHCR op cit (n12) 3.

⁴⁴ Ibid. According to the UNHCR, 3.2 million applicants were waiting for decisions by the end of 2015.

Although repatriation of refugees is the preferred solution of the UNHCR,⁴⁵ resettlement schemes have long been one of the durable solutions for people fleeing from persecution. While the UNHCR has expanded the definition of the term ‘refugee’ to include persons fleeing from human rights violations and generalised violence and thus including them under their mandate, only persons considered to be refugees under the 1951 Convention are assigned for resettlement by the UNHCR.⁴⁶ This is due to the lack of resettlement places and the fact that most receiving States apply the narrower definition as provided for in the 1951 Convention.⁴⁷ This forces the UNHCR to only assign refugees who are under the most immediate threats for resettlement.⁴⁸

While Fonteyne as early as in 1983 argued that burden-sharing was a rule of customary international law due to

[t]he widespread pattern of recognition, coupled with its repeated application in State practice, [which] seems to leave little room indeed for doubt concerning the legal nature of the principle, and its binding characters for States, at least within the framework of UN Charter law,⁴⁹

State practice in the wake of this statement is neither uniform nor conclusive enough to establish a legally binding rule of customary law pertaining to the aspect of resettlement.⁵⁰ Unfortunately, it is clear that ‘[n]o country is legally obliged to resettle refugees.’⁵¹ Nonetheless, the number of States accepting resettlement refugees is currently rising,⁵² which demonstrates how physical burden-sharing occur, albeit based on political commitment to aid refugees, and not legal obligations. The following section will examine regional undertakings of physical and fiscal burden-sharing, and whether they create legal obligations on the States partaking in them.

⁴⁵ United Nations, General Assembly *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V) para 9.

⁴⁶ 1951 Convention *supra* (n3) Article 1 (A) (2).

⁴⁷ UNHCR Resettlement Handbook 2011, Ch. 7.4.5, available at <http://www.unhcr.org/46f7c0ee2.pdf>, accessed on 2 July 2017.

⁴⁸ Zieck *op cit* (n6) 156.

⁴⁹ J-PL Fonteyne ‘Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in cases of Mass Influx of Refugees’ (1978-1980) 8 *AustYBIL* 162-188 at 184.

⁵⁰ Hurwitz *op cit* (n1) 161.

⁵¹ UNHCR *op cit* (n47) 36.

⁵² From 27 countries in 2014 to 33 in 2015. See UNHCR *op cit* (n12) at 26.

IV REGIONAL, LEGAL OBLIGATIONS TO SHARE THE BURDEN OF REFUGEES

Physical burden-sharing in the European Union

As of 2008, the Lisbon Treaty on the Functioning of the European Union⁵³ (TFEU) obligates the Member States to ‘develop a common policy on asylum, subsidiary protection and temporary protection ... ensuring compliance with the principle of *non-refoulement*.’⁵⁴ Furthermore, the same treaty prescribes that the Union shall adopt a ‘common European asylum system’ which should determine responsibility in between the member States for processing asylum applicants.⁵⁵ Article 80 of the TFEU requires that the member States implement this rule in their relevant domestic legislation, as the legislation of each member State ‘shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.’ As the TFEU is ratified by the member States, they are legally obliged to act in accordance with it. However, the obligations set forth in the TFEU does not clarify how solidarity is achieved, nor what constitutes ‘fair sharing’ of responsibilities under the treaty.

The treaty would, interpreted in the ordinary meaning of its words,⁵⁶ invoke a notion of proportionality and therefore make the fair and solidary sharing of responsibilities relative to the capacity of each member State. The European Parliament has defined the concept of ‘solidarity’ under Article 80 as ‘unity or agreement of action that produces or is based on community of interests, objectives, and standards.’⁵⁷ The concept is intended to ensure support to the ‘Member States which ... on account of geographical and demographic factors, carry a heavier burden of responsibility than others.’⁵⁸ From this, it must be concluded that the member States of the European Union (EU) are under a general legal obligation to assist one another by sharing the burden of asylum applicants and refugees.

⁵³ European Union *Consolidated Version of the Treaty on the Functioning of the European Union*, OJ C 115, 9 May 2008.

⁵⁴ *Ibid* Article 78.

⁵⁵ *Ibid*.

⁵⁶ Vienna Convention *supra* (n31).

⁵⁷ Committee on Civil Liberties, Justice and Home Affairs ‘Working document on Article 80 TFEU – Solidarity and fair sharing of responsibility, including search and rescue obligations (INI report on the situation in the Mediterranean and the need for a holistic EU approach to migration)’ (2015) DT\1067814EN.doc at 3.

⁵⁸ *Ibid*.

The Council of the European Union (The Council) decided in 2015 that more than 120 000 asylum applicants were to be relocated from Italy and Greece to EU States located further away from these first asylum countries.⁵⁹ The European Commission reported in May 2017 that ‘almost all Member States are ... relocating [refugees] from Italy and Greece,’ thus complying with their obligations as prescribed by the Council Decision, and thus with TFEU Article 80.

Hungary, Poland and Austria were the only non-contributing States with regards to the relocation of refugees, and were according to the Commission violating their legal obligations.⁶⁰ The mentioned countries are currently disputing the legality of the Council Decision, and the case is at the time of writing being assessed by the European Court of Justice (ECJ).⁶¹ This is a palpable sign of the binding nature of the Decision. Moreover, the Council Decision does limit the options of member States who wish to avoid partaking in the relocation scheme. Non-participation is conditional on ‘exceptional circumstances’ that make the member State ‘temporarily unable to take part in the relocation process of up to 30 per cent of applicants allocated to it...’ As of these restrictions, only a relatively small derogation from the stipulated numbers are possible.

Moreover, such an exception needs to be ‘duly justified’ by the State.⁶² An antithetic interpretation of the decision thus makes it clear that it is a legally binding instrument, obligating EU States to a minimum of burden-sharing. While awaiting the ECJ’s decision, it can be concluded that the TFEU and the Council Decision illustrate how the EU operates with legal obligations intended to relocate and resettle refugees between its member States.

Physical burden-sharing in Africa

While the 1951 Convention does not provide the global community with positive legal obligations to burden-share by way of resettlement, the *Convention Governing the*

⁵⁹ See Council of the European Union *Decision (EU) 2015/1601 of 22 September 2015 Establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, OJ L 248, 24 September 2015, Article 4.

⁶⁰ Report from The Commission to the European Parliament, the European Council and the Council, 12th report on Relocation and Resettlement, Strasbourg, 16 May 2017 at 3.

⁶¹ Ibid.

⁶² Council Decision (EU) supra (n59) Article 4 (5).

Specific Aspects of Refugee Problems in Africa (OAU Convention) does provide its signatory States with an unambiguous obligation to burden-share:

Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States *shall* in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.⁶³ (Emphasis added.)

Accordingly, the OAU Convention places a positive obligation on its member States to assist one another in times of need. However, what ‘appropriate measures’ entail, is not clarified by the OAU Convention. Neither does history provide any examples of this particular African solidarity, where the Article has been invoked with the consequence of the burden of asylum seekers and refugees being distributed.⁶⁴

Legal obligations to fiscal burden-sharing on the regional level

Although there is no evidence to suggest the existence of a legal obligation to burden-share on a global level; neither fiscally nor physically,⁶⁵ there are examples of obligations to share financial burdens on the regional level. An example is the Cotonou Agreement, ratified by the EU and 79 African, Caribbean and Pacific (ACP) countries as a legal framework for the cooperation between the EU and the ACP countries. Chapter 6 of the Agreement deals with humanitarian and emergency assistance, and provides that such assistance

shall be accorded to the population in ACP States faced with serious economic and social difficulties of an exceptional nature resulting from natural disasters, man-made crises such as wars and other conflicts or extraordinary circumstances having comparable effects. The humanitarian and emergency assistance shall be maintained for as long as necessary to deal with the emergency needs resulting from these situations.⁶⁶ (Emphasis added.)

Furthermore, the assistance provided

shall aim to ... address the needs arising from the displacement of people (refugees, displaced persons and returnees) following natural or man-made disasters so as to meet, for as long as necessary, all the needs of refugees and displaced persons

⁶³ Organization of African Unity *Convention Governing the Specific Aspects of Refugee Problems in Africa* 10 September 1969, 1001 UNTS 45, Article 2 (4).

⁶⁴ Ncumisa Willie & Popo Mfubu ‘Responsibility Sharing: Towards a Unified Refugee Protection Framework in Africa’ (2016) 2 *AHMR* No 3 542-567 at 555.

⁶⁵ Hurwitz op cit (n1) 163.

⁶⁶ *Cotonou Agreement, Partnership Agreement 2000/483/EC between the African, Caribbean and Pacific Group of States of the one part, and the EU, of the other part*, OJ L 317, 15 December 2012, Article 72 (1).

(wherever they may be) and facilitate action for their voluntary repatriation and re-integration in their country of origin...

The wording of the Agreement is positively binding, and obligates the EU to provide ACP States with humanitarian aid of relatively generous proportions, in order to address *all* needs arising from the displacement of persons. However, there is a threshold which might be interpreted restrictively before such aid is dispensed; the ACP State in need must face 'serious economic and social difficulties of an exceptional nature' before the EU is obliged to assist. The restrictive wording severely limits the scope of this obligation.

Internally, the EU has seen a development in fiscal burden-sharing programs in relation to mass influxes of asylum seekers. The European Refugee Fund (ERF) was created with the objective of redistributing financial resources proportionate to the economic burdens borne by member States.⁶⁷ At its time of creation it was characterised as the 'most ambitious attempt to institutionalise refugee burden-sharing in the EU.'⁶⁸ The fund allocates a lump sum to each member State, before disbursing the remaining funds relative to the number of asylum seekers the individual Member State had received over the last three years.⁶⁹ The ERF was in 2013 absorbed into the newly created Asylum, Migration and Integration Fund (AMIF),⁷⁰ covering the period of 2014 to 2020 with a budget of €3.137 billion.⁷¹ The expressed purpose of the AMIF is, among others, 'to enhance solidarity and responsibility-sharing between the Member States, in particular towards those most affected by migration and asylum flows, including through practical cooperation.'⁷² As the AMIF is funded through appropriation, authorised by the European Parliament and the Council, taken from the multi annual budget financed by the Member States,⁷³ the fund stands as an example of a mandatory method of financial burden-sharing within the European Union.

⁶⁷ James C Hathaway & Michelle Foster *The Law of Refugee Status* (2014) 293.

⁶⁸ Eiko R Thielemann 'Symbolic Politics or Effective Burden-Sharing: Redistribution, Side-payments and the European Refugee Fund' (2005) 43 *JComMarSt* No. 4 807-824 at 816.

⁶⁹ European Commission on Migration and Home Affairs webpage, available at https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/refugee-fund_en, accessed on 15 July 2017.

⁷⁰ European Parliament and Council *Regulation (EU) No 516/2014 Establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions 2007/435/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC*, OJ L 150, 16 April 2014.

⁷¹ AMIF website, available at: https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en, accessed on 1 July 2017.

⁷² Parliament and Council *Regulation (EU) No 516/2014* supra (n70) Article 3 (2) (d).

⁷³ *Ibid* Article 14 (2).

V CONCLUSIONS

As shown in this chapter, there are no universal legal obligations to share the burden of refugees and asylum seekers, either through resettlement or through fiscal transfers. However, regional legal obligations to relocate both funds and asylum seekers do exist, and are growing in importance, as evidenced by the uneven distribution of asylum seekers in regional scenarios. Of particular relevance to burden-sharing in Europe is the supranational legislation adopted through the Councils Directives, prescribing Member States with legal obligations to share both responsibilities and costs of refugees.

CHAPTER 3: THE ‘THIRD SAFE COUNTRY’ NOTION AND THE AVOIDANCE OF RESPONSIBILITIES TOWARDS REFUGEES

I INTRODUCTION

Violent and oppressive regimes persecuting ethnic, religious and political minorities are not an irregular occurrence. Neither is the phenomenon of persecuted persons escaping such regimes. However, the technology of the modern world offers unprecedented ease of both global communication and travel. Accessible information regarding the physical safety and the (perceived) economic benefits and prospects of the global North has, in combination with a more accessible international transportation system, led to unprecedented numbers of asylum seekers reaching the shores⁷⁴ and borders of developed countries.⁷⁵

The combined practices of visa requirements and carrier-sanctions, alongside a previously less accessible transportation system, have long constituted effective barriers hindering asylum seekers from reaching the territories of developed countries, as protection largely depends on the applicants’ physical presence within the asylum State.

⁷⁴ Unfortunately, not all people who set out for Europe by way of sea, reach its shores. See Chapter 5.

⁷⁵ A large portion of asylum seekers actively use social media to gain strategic information, aiding them in the migration towards countries of asylum. See Rianne Dekker & Godfried Engbersen ‘How Social Media Transform Migrant Networks and Facilitate Migration’ (2014) *Global Networks*, Vol. 14, Issue 4 401-418 at 410.

The principle of *non-refoulement* is intrinsically linked to the questions of responsibility and burden-sharing, as it constitutes the non-derogable nexus between an asylum State and an asylum seeker,⁷⁶ rendering the State obligated to protect the individual. As noted by Neve and Hathaway, western States have ‘sought to avoid the arrival of refugees by adopting policies of external deterrence’⁷⁷ since the fading of the interest-convergence between them and refugees.⁷⁸ As legal obligations only arise once asylum seekers are under the effective or formal control of a State,⁷⁹ western States have manipulated the distribution of refugees that would ensue from a sincere application of the principle of *non-refoulement*. This has primarily been done through the implementation of *non-entrée* policies.⁸⁰ Visa requirements, commonly placed on nationals of refugee-generating States, coupled with fines levied on carriers who transport such nationals in contradiction of said visa requirements, have insulated western States from asylum seekers, and the obligations and burdens that their arrival entail.⁸¹

The ‘safe third country’ concept labels certain countries as safe, in order to relieve the sending State of its responsibilities towards certain asylum seekers.⁸² If the applicant has travelled through a State labelled safe by the sending State, the applicant may be deported. Thus, the concept seeks to justify the removal of asylum seekers from the sending State. This, of course, frees the State from the financial and socio-political implications of receiving the removed applicants.

The ‘third safe country’ concept constitutes a second measure of insulation against the burdens of refugees for developed States. Based on a narrow, antithetical interpretation of Article 31 (1) of the 1951 Convention, an asylum seeker may be penalised for illegally entering a State, unless she is ‘coming directly from a territory where [her] life or freedom was threatened.’ This position, often taken by States in

⁷⁶ ‘... Particular States have legal obligations only toward refugees who are within the sphere of their formal or de facto jurisdiction.’ See Hathaway & Neve op cit (n33) 119.

⁷⁷ Ibid at 120.

⁷⁸ At the time of drafting of the 1951 Convention, there was a strong alignment of interests between labour-hungry post-war States and refugees. For a detailed description of the interest-convergence, see Ibid at 119 note 7.

⁷⁹ Ibid at 119.

⁸⁰ A term first coined by James C Hathaway in ‘The Emerging Politics of Non-Entrée’ (1992) *Refugees*, Vol. 91 at 40-41, suggesting that ‘whereas refugee law is predicated on the duty of *non-refoulement* ... the politics of *non-entrée* is based on a commitment to ensuring that refugees shall not be allowed to arrive.’

⁸¹ Hathaway & Neve op cit (n33) 120.

⁸² Goodwin-Gil & McAdam op cit (n20) 392.

favour of the concept, is among legal experts considered to be contradictory to both the wording and purpose of the Article — which is to protect refugees from penalisation ‘whatever their legal status upon entry.’⁸³ Nonetheless, consensus remains among scholars, that international law permits the return of asylum seekers to third countries that both accept the responsibility for determining the applicant’s status, and produce ‘substantive and procedural human rights guarantees.’⁸⁴

This chapter principally argues that while legal, the ‘third safe country’ notion is a precarious concept designed to distribute responsibilities for refugees, but often used to avoid the burdens that comes with receiving refugees. This measure of avoidance may, in turn, easily lead to the *refoulement* of refugees.

This chapter consists of five subsections. The following section will outline the requirements which must be met for the application of the third safe country concept to be legal under international law. The third section will examine the practice of the concept within the EU. The fourth section examines the European practice of the concept in relation to non-EU countries, before applying the observations of section two and three to the recent and topical readmission agreement between the EU and Turkey. Finally, the conclusion will summarise the observations of the chapter.

II INTERNATIONAL REQUIREMENTS FOR THE APPLICATION OF THE ‘SAFE THIRD COUNTRY’ CONCEPT

The UNHCR has long been critical of ‘safe third country’ practices, and the looming threat of *refoulement* such policies represent. The organisation launched an expert committee in 2002, articulating a non-exhaustive list detailing the necessary minimum requirements for the protection offered by the receiving State to be deemed ‘effective’, which must be met for the removal to be in accordance with international law.⁸⁵ As the fundamental condition for the legality of the ‘third safe country’ concept, the committee stressed that ‘the question of whether a particular third country is safe for the purpose of returning an asylum-seeker is not a generic question, which can be

⁸³ Rosemary Byrne & Andrew Shacknove ‘The Safe Country Notion in International Law’ (1996) 9 *HarvHumRtsJ* 185-228 at 190. See also Cathryn Costello ‘The Asylum Procedures Directive and the Proliferation of Safe Country Practices’ (2005) 7 *EJIL* 35-69 at 40.

⁸⁴ Goodwin-Gil & McAdam op cit (n20) 395.

⁸⁵ Amnesty International Canada & Canadian Council for Refugees ‘Contesting the Designation of the US as a Safe Third Country’ (2017) at 9, available at ccrweb.ca/sites/ccrweb.ca/files/stca-submission-2017.pdf, accessed on 2 August 2017.

answered for any asylum-seeker in any circumstances.’⁸⁶ Thus, an individual assessment of the applicant’s safety in the receiving country is of utmost importance.

According to the expert committee, the ‘respect for human rights, the lack of real risk of deportation to another State where effective protection is unavailable, the existence of fair and efficient refugee determination procedures, the provision of sufficient means of subsistence, and the taking into account of “special vulnerabilities of the party concerned” and maintenance of the “privacy interests of the person and his or her family”’ all constitute minimum requirements for a State to be labelled safe enough for a transfer to be in step with international law.⁸⁷ As noted by Goodwin-Gil, such ‘effective protection’, may be hindered by restrictions on asylum seekers’ access to formal procedures in the receiving State. He resolves that in order to mitigate these concerns, the receiving State should guarantee a

willingness to readmit asylum seekers, acceptance of responsibility to determine claims to refugee status, notwithstanding departure from the country in question or the circumstances of initial entry, the treatment of applicants during the determination process in accordance with generally accepted standards, and some provision with respect to subsistence and human dignity issues, such as social assistance or access to the labour market in the interim, family unity, education of children and so forth.⁸⁸

This section has established the international requirements for readmissions to ‘safe third countries’ to be considered legal under international law. As will be shown in the following section, these requirements have mostly been adhered to in decisions of European supranational courts.

III EUROPEAN ‘SAFE THIRD COUNTRIES’ PRACTICES

The practice of ‘safe third country’ policies originated in Europe,⁸⁹ for the purpose of combating various issues arising from the abolition of the internal borders of the Schengen area. This allowed for persons, including asylum seekers, to move easily between the member States of the Schengen agreement.⁹⁰ The abolition of border controls led to disputes among member States, over which State was responsible for

⁸⁶ Emily Carasco ‘Canada-United States “Safe Third Country” Agreement: To What Purpose?’ (2003) 41 *ACDI* 305-342 at 313.

⁸⁷ Amnesty International Canada & Canadian Council for Refugees op cit (n85) 9.

⁸⁸ Goodwin-Gil & McAdam op cit (n20) 396.

⁸⁹ Carasco op cit (n86) 308.

⁹⁰ Jason Mitchell ‘The Dublin Regulation and Systemic Flaws’ (2016-2017) 18 *SDILJ* 295-324 at 301.

the determination of individual asylum applications.⁹¹ The Dublin Convention of 1990⁹² sought to put an end to such disputes, while preventing both ‘delayed access to protection for an asylum seeker if no Member State claimed responsibility’; as well as ‘asylum seekers from choosing a Member State they perceived as most favourable,’⁹³ a phenomenon commonly referred to as asylum shopping.

The Convention was replaced by the Dublin Regulation in 2003,⁹⁴ and the second revision of the Regulation came into effect in January 2014.⁹⁵ This regulation (Dublin III) requires member States to ‘examine any application for international protection by a third-country national or stateless person who applies on the territory of any one of them, including at the border or in the transit zones.’⁹⁶ The asylum application is to be examined by a single member State, as determined per chapter 3 of the Dublin III. Chapter 3 establishes a clear hierarchy of nexuses, where family connections are given priority.⁹⁷ However, if the applicant has no such connections, the responsibility to determine the application falls to the first member State to which the applicant entered.⁹⁸

Importantly for the protection of refugees, the Dublin III establishes various safeguards. Chief among them, is the prohibition of transferring an applicant if there are ‘substantial grounds for believing’ that the asylum procedures or reception conditions of the receiving State suffer from ‘systemic flaws.’⁹⁹ The sending State is to be responsible for determining the applicant’s claim if these flaws constitute a ‘risk of inhuman or degrading treatment,’ as provisioned by Article 4 of the Charter of Fundamental Rights of the European Union¹⁰⁰ (CFREU). As Article 4 of the CFREU

⁹¹ Ibid.

⁹² European Union *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (Dublin Convention)*, OJ C 254, 19 August 1997.

⁹³ Mitchell op cit (n90) 301.

⁹⁴ Council of the European Union *Regulation No. 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II)*, OJ L 50/1.

⁹⁵ Mitchell op cit (n90) 301.

⁹⁶ European Parliament and Council *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast) (Dublin III)*, OJ L 180, 29 June 2013, Article 3 (1).

⁹⁷ Ibid Article 8 to 12.

⁹⁸ Ibid Article 13.

⁹⁹ Dublin III supra (n96) Article 3 (2).

¹⁰⁰ Ibid.

is identical to Article 3 of the European Convention on Human Rights (ECHR), the subjection of an applicant to ‘torture or to inhuman or degrading treatment or punishment’ would necessarily constitute a ‘systematic flaw’ under Dublin III.¹⁰¹

A systemic flaw was illustrated by the European Court of Human Rights (ECtHR), in the landmark case of *M.S.S v Belgium and Greece*. The case concerned an Afghan asylum seeker who first entered Europe through Greece before he reached Belgium, where he applied for asylum.¹⁰² In accordance with the Dublin Regulation,¹⁰³ the applicant was readmitted to Greece.¹⁰⁴ Subsequently he was detained, in squalid conditions, and upon release he was forced (given his impoverished state) to live on the streets of Athens.

The court recalled its previous judgment *S.D. v Greece*,¹⁰⁵ in which the confinement of an asylum seeker in ‘a prefabricated cabin for two months without allowing him outdoors or to make a telephone call, and with no clean sheets and insufficient hygiene products, amounted to degrading treatment within the meaning of Article 3’¹⁰⁶ of the ECHR. The court thus concluded that a six-day detainment, in a confined space without the access to walks, leisure or free access to toilets was ‘unacceptable with respect to Article 3’ of said convention.¹⁰⁷

Furthermore, the court held that Greek authorities were obliged to uphold minimum standards for the reception of asylum seekers, including the ‘obligation to provide accommodation and decent material conditions to impoverished asylum seekers.’¹⁰⁸ The court found his protracted, humiliating and desperate situation to constitute a violation of Article 3 of the ECHR. While the court found Belgium to be in violation of the same article due to its lacking verification of the dysfunctional Greek procedural practices of which ‘Belgian authorities knew or ought to have

¹⁰¹ Goodwin-Gil & McAdam op cit (n20) 313.

¹⁰² *M.S.S. v Belgium and Greece* 2011 ECtHR Grand Chamber, Application No. 30696/09.

¹⁰³ Dublin Regulation supra (n94) Article 10 (1).

¹⁰⁴ *M.S.S. v Belgium and Greece* supra (n102) para 14.

¹⁰⁵ *S.D. v Greece* 2009 ECtHR Application No. 53541/07.

¹⁰⁶ *M.S.S. v Belgium and Greece* supra (n102) para 222.

¹⁰⁷ Ibid.

¹⁰⁸ *M.S.S. v Belgium and Greece* supra (n102) para 250.

known,¹⁰⁹ both countries were found to have violated the applicants' right to effective remedy.¹¹⁰

As the highest court within European Union law, the ECJ referenced *M.S.S v Greece and Belgium* in its subsequent joined decisions of *N.S. v Secretary of State and M.E. v Refugee Applications Commissioner*.¹¹¹ The court ruled that 'European Union law precludes the application of a conclusive presumption' that the responsible member State under the Dublin Regulation observes 'the fundamental rights of the European Union'.¹¹² The two judgments are generally recognised to have established a duty with removing States to individually ascertain that applicants only are transferred to member States which asylum procedures does not suffer from 'systematic deficiencies'.¹¹³

In the wake of these decisions, Greece's asylum system was considered systemically flawed, to the extent that all readmissions to the country came to a halt. In practice, this shifted the responsibility for determination processes to the would-be removing States.¹¹⁴

IV THE EUROPEAN APPLICATION OF THE 'THIRD SAFE COUNTRY' NOTION OUTSIDE OF THE EU

The Intra-European system for designating responsibility for asylum seekers, regulated through the Dublin Convention and the later Regulations as described above, was built on the assumption that asylum seekers would receive equal access to asylum procedures and protection in all member States.¹¹⁵

However, both the EU and individual member States pursue the avoidance of responsibility for determining asylum claims by way of transferring applicants to

¹⁰⁹ Susan Fratzke 'Not Adding Up: The Fading Promise of Europe's Dublin System' (2015) *Migration Policy Institute*, Brussels at 11.

¹¹⁰ Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 13.

¹¹¹ *N. S. (C 411/10) v Secretary of State for the Home Department and M. E. and others (C 493/10) v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* 2011 European Court of Justice of the European Union C-411/10 & C-493/10.

¹¹² *Ibid* para 105.

¹¹³ Fratzke *op cit* (n109) 18.

¹¹⁴ Dublin III *supra* (n96) Article 3 (2).

¹¹⁵ Fratzke *op cit* (n109) 16.

‘third safe countries’ outside the EU.¹¹⁶ This is done through readmission agreements. The European Migration Network has defined readmission agreements as

[agreements] between the EU and/or a Member State with a third country, on the basis of reciprocity, establishing rapid and effective procedures for the identification and safe and orderly return of persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence on the territories of the third country or one of the Member States of the European Union, and to facilitate the transit of such persons in a spirit of cooperation.¹¹⁷

Although removal is not automatic, the Asylum Procedures Directive (APD)¹¹⁸ allows for the sending EU State to ‘consider an application for international protection as inadmissible’ if ‘a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38.’¹¹⁹ If a country which the applicant transited through is labelled ‘safe’ in accordance with Article 38, her asylum application will not be determined on its merits, unless she can convince the relevant authority that her return will be unsafe.¹²⁰

The APD¹²¹ constitutes the legal instrument regulating whether an applicant can be removed to a ‘safe third country’ by a EU State,¹²² and Article 38 of the directive establishes a series of principles of which ‘the competent authorities [of the removing State must be] satisfied that a person seeking international protection will be treated in accordance with’ in the relevant third country:

- a) Life and liberty of the applicant must not be threatened on grounds of race, religion, nationality, membership of a particular social group or political opinion.
- b) There must be no risk of serious harm as defined in Article 15 of Directive 2011/95/EU.

¹¹⁶ Mariagiulia Giuffré ‘Readmission Agreements and Refugee Rights: From a Critique to a Proposal’ (2013) 32 *RSQ*, Issue 3 79–111 at 79.

¹¹⁷ European Migration Network, Glossary, available at: <http://emn.intrasoft-intl.com/Glossary/viewTerm.do?startingWith/4R&id/4223>, accessed on 23 July 2017.

¹¹⁸ European Parliament and Council, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection*, OJ L 77, 23 March 2016.

¹¹⁹ *Ibid* Article 33 (2).

¹²⁰ Emanuela Roman, Theodore Baird & Talia Radcliffe ‘Statewatch Analysis: Why Turkey is not a “Safe Country”’ (2016) *Statewatch* at 3, available at <http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf>, accessed on 1 August 2017.

¹²¹ Asylum Procedures Directive *supra* (n118).

¹²² Giuffré *op cit* (n116) 85.

- c) The principle of *non-refoulement* as provided for in Article 33 of the 1951 Convention must be respected by the receiving State.
- d) The receiving State prohibits removal of persons in violation of the right to freedom from torture and cruel, inhuman or degrading treatment.
- e) Asylum procedures allowing for the applicant to request asylum and refugee status, affording the applicant protection as per the 1951 Convention if refugee status is granted.

As established by the ECJ judgment noted in section III, it does not suffice that the receiving State has ratified the relevant instruments, as the principles above must be upheld and actively applied by the receiving State.¹²³ In addition to prescribing that the receiving State respects basic human rights and established principles of international refugee law, the provision requires implementation of national legislation on part of the removing State. This legislation must require the establishment of ‘a connection between the applicant and the third country concerned,’ in addition to rules determining the methodology to be used in the verifying of whether a third safe country is truly safe.¹²⁴ These rules must allow for the

individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances.¹²⁵

Accordingly, the procedure must allow for the asylum seeker to appeal the application of the third safe country concept, based on her individual situation.

The APD also prescribes that asylum seekers must be ensured access to ‘an effective remedy before a court or a tribunal, against’ the consideration of ‘an application to be inadmissible,’ as a consequence of the application of the ‘third safe country’ notion.¹²⁶ Accordingly, the APD establishes rules ensuring that the European practices of ‘safe third country’ policies are in accordance with the minimum requirements set by international law, as outlined above in section II.

¹²³ Reinhard Marx ‘Legal Opinion on the Admissibility under Union law of the European Council’s plan to treat Turkey like a “safe third state”’ (2016) *Pro Asyl* at 4, available at <https://www.proasyl.de/en/material/legal-opinion-on-the-admissibility-under-union-law-of-the-european-councils-plan-to-treat-turkey-like-a-safe-third-state/>, accessed on 24 July 2017.

¹²⁴ Asylum Procedures Directive *supra* (n118) Article 38 (2).

¹²⁵ *Ibid* Article 38 (2) (c).

¹²⁶ *Ibid* Article 46 (1) (a) (ii).

This section has described the necessary requirements for a transfer of an applicant to a non-EU State to be legal under EU law. The ‘third safe country’ notion was originally purposed to effectively settle questions of responsibility. However, the concept does also serve as a tool for shirking responsibility for the burdens of refugees, burdens that would often befall the sending States, had the 1951 Convention been applied sincerely and without use of the concept. In the following, the requirements outlined in this section will be applied to the pertinent readmission agreement between the EU and Turkey.

(i) *Turkey as a ‘safe third country’*

In 2016, the EU entered into an agreement with Turkey for the purpose of preventing further influxes of asylum seekers from Turkey to European territories.¹²⁷ As the agreement was entered into by sovereign entities, it can be assumed that the terms agreed upon were regarded as mutually beneficial by the parties involved. While the agreement, on the State-level seek to distribute and determine responsibilities for refugees, it will in the following be shown how this particular agreement of burden-sharing is severely detrimental for asylum seekers and refugees.

According to the Joint Action Plan, Turkey shall restrict irregular movements from its territory to the EU as well as ‘readmit from the EU all irregular migrants who had transited through Turkey.’¹²⁸ The scope of the agreement was recently expanded to include asylum seekers whose applications were ‘found to be inadmissible’ by European States.¹²⁹

The legality of the transfer of asylum seekers to Turkey from the EU is, under EU law, regulated by the APD. For the readmission of an asylum seeker not to constitute a violation of the 1951 Convention, it must be ascertained by the removing State, or by the EU, that the individual applicant will be protected in Turkey from further *refoulement* leading to persecution.

As prescribed by APD Article 38 (1) (e), the third country to which an applicant is being transferred to must offer asylum procedures which, if refugee status is granted, entails the rights pursuant to the 1951 Convention. However, Turkey has

¹²⁷ Amnesty International ‘No Safe Refuge: Asylum-seekers and Refugees Denied Effective Protection in Turkey’ (2016) at 9, available at <https://www.amnesty.org/en/documents/eur44/3825/2016/en/>, accessed on 24 July 2017.

¹²⁸ Ibid at 10.

¹²⁹ Ibid.

made a reservation to its ratification of the 1967 Protocol, geographically limiting the definition of who can be considered a refugee to the one of the original 1951 Convention. Consequently, Turkey only applies the 1951 Convention, and only grants the rights therein, to ‘persons who have become refugees as a result of events occurring in Europe...’¹³⁰ (Emphasis added.)

Turkey recast its national regulation of the rights of asylum seekers and refugees in the Law on Foreigners and International Protection of 4 April 2013. As of Article 61 and 62 of the regulation, refugee status is reserved for European applicants, while non-European, and in light of current events, particularly Syrian asylum seekers may only be granted ‘conditional refugee status,’ a status which merely allows them ‘to reside in Turkey until they are resettled to a third country.’¹³¹ Therefore, the protection of ‘conditional refugees’ fall outside Turkey's application of the 1951 Convention, and the rights granted to non-European refugees fall short of that stipulated by the 1951 Convention. As of these limitations, ‘no possibility exists’ for non-European asylum seekers readmitted to Turkey ‘to receive protection in accordance’ with the 1951 Convention.¹³² Consequently, any EU member State which removes a non-European applicant to Turkey under the ‘safe third country’ concept will be violating the APD. Additionally, Turkey’s discriminate application of the 1951 Convention is at odds with the requirement of fair determination procedures,¹³³ and the removal may therefore also constitute a violation of international law.

Essential to the designation of Turkey as a ‘third safe country’ under both international and the APD, is the country’s upholding and respect for the principle of *non-refoulement*. While Turkey is bound by the principle as a rule of customary international law,¹³⁴ the Turkish national legislation only prohibits the ‘return’ of asylum seekers,¹³⁵ leaving the country’s observance of the obligation of non-rejection from its borders uncertain. While there are consistent reports and allegations of

¹³⁰ UNHCR ‘Declarations and Reservations to the 1951 Convention’ *UNHCR* at 4, available at <http://www.unhcr.org/afr/protection/convention/3d9abe177/reservations-declarations-1951-refugee-convention.html>, accessed on 1 August 2017.

¹³¹ Republic of Turkey, Minister of Interior, Law on Foreigners and International Protection, April 2014, Article 62 available at http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf, accessed on 27 July 2017.

¹³² Asylum Procedures Directive *supra* (n118) Article 38 (1) (e).

¹³³ See above under Section II.

¹³⁴ Guy S Goodwin-Gil *The Refugee in International Law* 2ed (1996) 166-167.

¹³⁵ Law on Foreigners and International Protection *supra* (n131) Article 4.

systematic breaches of the principle of *non-refoulement* commissioned by Turkey,¹³⁶ the establishment of such facts is outside the scope of this research. Granted that the reports are correct, however, a designation of Turkey as a ‘safe third country’ and a return of asylum seekers from a EU State to Turkey would constitute a violation of the APD Article 38 (c), as well as of the principle of *non-refoulement* as a rule of customary international law.

This section has explored some of the serious concerns related to the readmission agreement between the EU and Turkey, and illustrates how the ‘third safe country’ notion is applied in order to avoid responsibilities and burdens related to the reception of asylum seekers. Evidently, the EU has entered into an agreement which ultimately violates the legal requirements for ‘third safe country’ removals which the EU itself has enacted.

V CONCLUSIONS

As shown in this chapter, the ‘safe third country’ concept constitutes yet another sophisticated method for avoiding responsibility for asylum seekers and refugees, implemented on several continents by developed countries for the purpose of reducing their share of the burden of refugees and asylum seekers. Although the concept have found acceptance in international law, the legitimacy of the individual transfer relies on the receiving States' respect for both international human rights and refugee law. Importantly, all removing States are under international law responsible for ascertaining that the applicant will not suffer from *refoulement* as a result of the transfer. Additionally, removing EU States are required by the APD to ascertain that the human rights of the applicant will be respected in the third country, and that the applicant will be granted access to a formal asylum procedure of which a positive determination will grant the applicant the rights entailed by the 1951 Convention.

As shown in this chapter, the Dublin system has established legal obligations for the EU member States to ensure the protection of asylum seekers, and that they receive a fair and formal determination of their applications. However, as illustrated by the decisions of the ECtHR and the ECJ, the asylum procedures of some member States are not adequately handling the pressure of recent mass-arrivals, increasing the

¹³⁶ Roman, Baird & Radcliffe op cit (n120) 17.

importance of the removing State's ascertaining of the aptitude of the asylum procedures of the receiving State, before effectuating a transfer.

Finally, the 'safe third country' agreement made to keep asylum seekers at bay between the EU and Turkey, has been shown to pose a serious threat to the principle of *non-refoulement*. As shown in this chapter, there is ample evidence that the assumption that Turkey is indeed a safe country for asylum seeker, could render the removing countries responsible for both direct and indirect *refoulement*. The concept, and this chapter, illustrate how States implement policies which often conflicts with their obligations under international refugee law, in order to avoid the burdens of refugees.

CHAPTER 4: THE RIGHTS OF REFUGEES, ASYLUM STATES AND THE UNHCR TO CLAIM COMPENSATION FROM REFUGEE-GENERATING STATES

I INTRODUCTION

The current refugee regime leaves the economic burdens of caring for the millions of refugees worldwide with the refugees themselves, with asylum States, and with international relief organisations like the UNHCR. The possibility of holding the State which is responsible for the creation of refugees to the financial cost of their protection is alluring, and a proposition which legal merits will be explored and examined in this chapter.

An escape from persecution typically leaves the refugee with little material assets other than what she is able to bring with her. Therefore, the need for the asylum State or relevant relief organisations to provide care and assistance by means of shelter, food and clothing is often imperative for the survival of the persecuted person. Accordingly, the persecution which necessitates this protection and assistance lead to financial burdens for all parties involved, except for the party responsible for generating these burdens.

The questions of fiscal responsibility for the creation of refugees and the entailing compensation can be posed with several claimants. The primary loss is borne by the individual refugee herself, as properties belonging to her which have been seized, destroyed, or which she simply had to leave behind due to the threat of persecution, constitute a financial loss on her part.

This chapter will principally argue that there are ways in which individual refugees, asylum States and the UNHCR may seek compensation for expenditure relating to the care of refugees, from the State responsible for their creation. This chapter will examine whether a refugee can claim compensation from a country of origin for losses inflicted by the State as a result of direct or indirect persecution, and how.

In the case of a mass influx of asylum seekers,¹³⁷ the asylum State must meet the basic needs of all refugees present in its territory, which demands the allocation of large sums of money.¹³⁸ This chapter will examine the judicial measures that are available to the receiving State, when seeking compensation from the refugee-generating State for these expenses.

Finally, the legal rights and possibilities of the United Nations, specifically the UNHCR, to seek compensation from refugee-generating States for expenditure relating to relief rendered to refugees will be examined. The chapter will primarily explore the options of redress through judicial claims before the ICJ.

This chapter consists of nine subsections. In the following section, the concept of State sovereignty will be outlined, as a backdrop to the concept of State responsibility, which will be explored in the third section. Section four will establish the act of creating refugees as an internationally wrongful act. Section five will establish the legal right of individual refugees to compensation, while section six will

¹³⁷ The ExCom Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations No. 100 (LV) – 2004 (GA document A/AC.96/1003) defines a ‘mass influx’ as a situation comprised of some or more of the following characteristics: ‘(i) considerable numbers of people arriving over an international border; (ii) a rapid rate or arrival, (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers.’

¹³⁸ Germany estimates that about €23bn was spent on migrants and refugees in the country in 2016, see Lizzie Dearden ‘Germany “spent more than €20bn on refugees in 2016” as crisis outstrips state budgets’ *The Independent* 10 March 2017, available at <http://www.independent.co.uk/news/world/europe/germany-refugees-spend-20-billion-euros-2016-angela-merkel-crisis-budgets-middle-east-north-africa-a7623466.html>, accessed on 10 July 2017.

explore the legal measures available to refugees in seeking redress from the refugee-generating State. Section seven will argue the right of asylum States to compensation while illustrating this right with a pertinent example. Section eight will explore some of the complaint mechanisms available to States, while section nine will establish the right of the UNHCR to compensation. The tenth and final section will present the conclusions of this chapter.

II SOVEREIGNTY

The core concept of international law is the sovereignty of States, and the primary subjects of international law are States.¹³⁹ Thus, a discussion on the obligation of States to provide compensation for damages would be incomplete if this basic principle of international law was left untouched. As proclaimed by Article 2 of its Charter, the United Nations is ‘... based on the principle of the sovereign equality of all its Members.’ The Declaration on Friendly Relations,¹⁴⁰ expands on the content of sovereign equality:

[A]ll States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community ... In particular, sovereign equality includes the following elements...

- (b) each State enjoys the rights inherent in full sovereignty;
- (c) each State has the duty to respect the personality of other States;
- (d) the territorial integrity ... of the State [is] inviolable...
- (f) each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.¹⁴¹

The domestic aspect of full sovereignty affords the State the right to exclusive jurisdiction over its territories, free from the interference of other States.¹⁴² Sovereignty in international law includes the ‘competence, immunity, or power, and in particular ... the power to make autonomous choices,’¹⁴³ thus allowing States to bind future behaviour through the ratification of international obligations. Arguably, sovereignty exists as a residual power that allows States behavioural freedom, yet only

¹³⁹ Samantha Besson ‘Sovereignty, International Law and Democracy’ (2011) 22 *EJIL* No. 2 373-387 at 376.

¹⁴⁰ Declaration on Friendly Relations *supra* (n29).

¹⁴¹ *Ibid*, under the principle of sovereign equality of States.

¹⁴² UN Charter *supra* (n30) Article 2 (4) and (7).

¹⁴³ Besson *op cit* (n139) 376.

in lieu of commitments to which the contracting States have consented.¹⁴⁴ While the freedom of States outside of international treaties is less than absolute considering the growing number of international legal obligations not founded on explicit consent, a discussion of these limits is outside the scope of this research. Nevertheless, it is clear that the principle of sovereignty allows States to enter into agreements with one another, as well as exercise jurisdiction within their own territory, free from outside intervention. This freedom from intervention, in turn, limits the powers of States, as the principle of equal sovereignty levies all States with ‘... a duty of non-intervention in the area of exclusive jurisdiction of other States.’¹⁴⁵

In this section, the concept of State sovereignty has been outlined. The following section will explore the concept of State responsibility.

III STATE RESPONSIBILITY

All States have a fundamental obligation towards their citizens in securing them the protection and enjoyment of human rights, and a breach of these obligations would render the State liable under international law.¹⁴⁶ Similarly, States incur responsibility for their actions and omissions resulting in damage to other States.

The maxim first stipulated by Grotius in 1646 that ‘fault creates the obligation to make good the loss’¹⁴⁷ suffered by an injured party, applies equally well in international and municipal law, and it is generally recognised that a wrongful act obligates the offender to make reparations.¹⁴⁸ It is a widespread and logically coherent notion, that the lack of an obligation to restitute wrongs would effectively remove the duty to observe international obligations.¹⁴⁹

In 2001, the International Law Commission (ILC) presented the Articles on Responsibility of States for Internationally Wrongful Acts,¹⁵⁰ (ILC Articles) a document which — while is not in itself formally binding — restates rules of

¹⁴⁴ TW Bennet & J Strug *Introduction to International Law* (2013) 49.

¹⁴⁵ Ian Brownlie *Principles of Public International Law* 4ed (1990) at 287.

¹⁴⁶ See below, Section IV.

¹⁴⁷ Hugo Grotius *De Jure Belli Ac Pacis* (1646) bk. II, ch. XVII, pt. 1 at 430.

¹⁴⁸ Bennet & Strug op cit (n144) 265.

¹⁴⁹ Luke T Lee ‘The Right to Compensation: Refugees and Countries of Asylum’ (1986) 80 *AJIL* 532-567 at 537.

¹⁵⁰ The ILC Articles were endorsed by the United Nations in GA Resolution 56/83, UN GAOR 56th Session A/RES/56/83 of 12 December 2001.

customary international law.¹⁵¹ This is illustrated by the prolific referral by international bodies to the ILC Articles since their publication,¹⁵² giving the Articles significant legal authority.

For State liability to incur, the rules of responsibility require that a wrongful act attributable to the State has been committed through action or omission, and that the commissioning ‘constitutes a breach of an international obligation of the State.’¹⁵³ As held by the UN Secretary-General in the *Rainbow Warrior arbitration*,

The general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international field there is no distinction between contractual and tortious responsibility, so that the violation of a State of any obligation, of whatever origin gives rise to State responsibility...¹⁵⁴

Accordingly, it is clear that violations of both treaty obligations and obligations of customary international law, entail liability for the commissioning State. The action imputable to the State may be both direct and indirect. As noted by the Inter-American Court of Human Rights (IACHR) in the case of *Rodriguez-Velasquez v Honduras*:

[A]n illegal act which violates human rights and which is initially not directly imputable to a State ... can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.¹⁵⁵

As one observer notes, indirect persecution attributable to the State may follow from the tolerance of ‘actions of unofficial persecutors [where the State] fails to provide their targets with the protection to which citizens or legally established foreign residents of law-abiding States are normally entitled.’¹⁵⁶ However, the intricacies of establishing such indirect coercion are outside the scope of this paper.

As established in this section, indirect and direct acts may render a State liable to pay restitution or compensation. The following section will establish the creation of refugees as an internationally wrongful act.

¹⁵¹ Bennet & Strug op cit (n144) 265.

¹⁵² A compilation made by the UN show that international courts, tribunals, and other bodies had referred to the ILC Articles in 154 instances. See UN Legislative Series, Book 25: ‘Materials on the Responsibility of States for Internationally Wrongful Acts’ Foreword, at vii, available at <http://legal.un.org/legislativeseries/book25.html>, accessed on 2 August 2017.

¹⁵³ See Article 2 of the ILC Articles supra (n150).

¹⁵⁴ *Rainbow Warrior (New Zealand v France)* 1990 Arbitration Tribunal 82 ILR 500 at 551.

¹⁵⁵ *Case of Velasquez-Rodriguez v Honduras* 1988 Inter-American Court of Human Rights, Annual Report of the Inter-American Court of Human Rights, Series C No 4, para 35.

¹⁵⁶ Aristide R Zolberg ‘The Formation of New States as a Refugee-Generating Process’ (1983) 467 *AnnAmAcadPoliticalSocSci* 467 24-38 at 26.

IV THE INTERNATIONALLY WRONGFUL ACT OF CREATING REFUGEES

Both direct and indirect creation of refugees by a State through persecution constitute a breach of international law, as such acts effectively violate any right of the individual that depends on the person's ability to live in her country of origin.¹⁵⁷ This position has explicit support in the Declaration of Principles of International Law on Compensation to Refugees (DPILCR).¹⁵⁸ All rights stipulated in the Universal Declaration of Human Rights (UDHR) stem from the basic right to live in one's country, making the creation of a refugee indeed a violation of the entire UDHR.¹⁵⁹ Furthermore, the International Covenant on Civil and Political Rights (ICCPR) provides, as a legally binding document, the 'right to liberty of movement and freedom to choose ... residence' to everyone lawfully within the territory of a State.¹⁶⁰ As persecution (as substantiated by the 1951 Convention, Article 1 (A) (2)) in itself is an arbitrary act, refugees are arbitrarily denied the right to liberty of movement and residence. This leaves the State responsible for the persecution in violation of Article 12 of the ICCPR.

On the regional level, Protocol 1 Article 1 of the European Convention on Human Rights¹⁶¹ (ECHR), accord citizens of the signatory States with the right to peacefully enjoy their possessions, while Article 8 of the ECHR stipulates the right to respect for one's home. The Inter-American Declaration on the Rights and Duties of Man, Article VIII stipulates the right to 'move about freely within' one's country of nationality, and the right 'not to leave it except by his own will.' Moreover, Article IX enshrines the 'right to the inviolability of [the individuals] home.' The African Charter

¹⁵⁷ Lee op cit (n149) 539.

¹⁵⁸ See the International Law Association, *Declaration of Principles of International Law on Compensation to Refugees*, 65th Conference, Cairo April 1992, principle 2.

¹⁵⁹ As noted by Luke Lee: 'Certainly, making a person a "refugee" would seriously affect his birthrights to "life, liberty and security of person" (Article 3); employment (Article 23); education (Article 26); family (Article 17); property (Article 17); social security (Article 22); non-discrimination (Article 2); dignity (Article 1); equality before the law (Article 7); freedom of opinion and expression (Article 19); freedom of peaceful assembly and association (Article 20); participation in government and public service (Article 21); and so forth. Thus, the country that turns its own citizens into refugees is in violation of *all* the articles of the Universal Declaration of Human Rights.' Op cit (n149) 539.

¹⁶⁰ United Nations, General Assembly *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Article 12.

¹⁶¹ *European Convention for the Protection of Human Rights and Fundamental Freedoms* supra (n110).

on Human and Peoples' Rights Article 12 prescribes the right to freedom of movement, while Article 14 stipulates the right to property. Article 6 provides the right to personal liberty and protection from arbitrary arrest. Clearly, all of these regional protection mechanisms are violated where persecution occurs, in addition to the international instruments listed above.

The UN Charter obligates all States to ensure the protection of human rights,¹⁶² thus establishing a 'legal duty for States to prevent as well as investigate and punish [human rights] violations, to restore violated rights, and to provide effective remedies to victims of violations.'¹⁶³ Accordingly, States are legally obliged by the Charter to uphold the rights prescribed in both the UDHR and the ICCPR, as well as any regional instruments they may have conceded to. As of this, the act of forceful displacement clearly constitutes a breach of both the rights of the persecuted person under international and regional human rights law, as well as of the obligation to uphold rights as stipulated by the UN Charter.

While treaty-based international law provides a range of rights which would be violated through the act of persecution, the legal source has its shortcoming in formalities, as treaties must be ratified by the relevant refugee-generating State for the State to be bound by its provisions. Customary international law however, applies universally without the explicit acceptance of the violating State. Importantly, States have no right to withdraw from rules of customary international law, and particularly not from customary law that protect human rights.¹⁶⁴

On the intra-State level, persecutory acts and omissions leading to the displacement of persons beyond the borders of their home State, invariably results in financial burdens for the receiving State. While the reception of a single refugee would not result in unbearable financial costs, a mass influx of asylum seekers can severely alter the ability of the asylum State to provide services for its own citizens.¹⁶⁵ As

¹⁶² UN Charter supra (n30) Article 1, 2, 10, 13, 55 and 56. Also see Lee op cit (n149) 541.

¹⁶³ Chaloka Beyani 'State Responsibility for the Prevention and Resolution of Forced Population Displacement in International Law' (1995) 7 *IJRL* (Special Issue) 130-147 at 138.

¹⁶⁴ Joseph Blocher & Mitu Gulati 'Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis' (2016) 48 *ColumHumRtsLR* 53-102 at 21.

¹⁶⁵ On the 30th September 2016, Turkish President R. Erdogan claimed Turkey's refugee expenditure had surpassed \$25 billion, see Mehmet Cetingüleç 'How did Ankara's spending on Syrian refugees jump to \$25 billion?' *Al-Monitor* 30 September 2016, available at: <http://www.al-monitor.com/pulse/en/originals/2016/09/turkey-syria-refugees-mind-blogging-increase-expenses.html>, accessed on 20 July 2017.

receiving States are obligated to at a minimum provide shelter, food, clothing and basic education,¹⁶⁶ the arrival of thousands of refugees entails significant financial burdens for the receiving State.¹⁶⁷

As early as 1891, US President Benjamin Harrison aptly declared that ‘a decree to leave one country is, in the nature of things, an order to enter another – some other.’¹⁶⁸ The act of expulsion is inevitably inflicting financial damage on the asylum State, a wrongful act under customary international law, but it does also constitute an infringement of the ‘inviolable’ right of the asylum State to its territorial integrity.¹⁶⁹

The position that irregular entry represents a violation of the territorial integrity of States is supported by the restrictive policies implemented by States to combat large-scale influxes of asylum seekers and refugees,¹⁷⁰ policies which are in turn illustrative of European States’ perception of asylum seekers as a threat to both sovereignty and territorial integrity.¹⁷¹

As of the above, it is clear that the creation of refugees is a wrongful act of international character. This is due to the violation of international human rights, directly against the refugee herself, and to the violation of customary international law, violating the sovereignty and the territorial integrity of the asylum State.

¹⁶⁶ See the 1951 Convention *supra* (n3) Article 22 and 23, which respectively obliges host States to provide refugees with elementary education and the same treatment as nationals regarding public relief and assistance.

¹⁶⁷ In the words of Peter H Shuck: ‘To deny the burdens that refugees sometimes impose on first asylum states is to blink reality and put one’s head in the sand.’ See ‘A Response to the Critics’ (1999) 12 *HarvHumRtsJ* 385-389 at 387.

¹⁶⁸ Lee *op cit* (n149) 255, quoting ‘Message of the President, 1891 Foreign Relations of the United States,’ at (xiii.). The Institut de Droit International reported that ‘[a] state cannot, either by administrative or judicial procedure, expel its own nationals whatever may be their differences of religion, race, or national origin. Such an act constitutes a grave violation of international law when its international result is to cast upon other territories individuals suffering from such a condemnation or even placed merely under the pressure of judicial proscription’ (11 *Institute de Droit International, Annuaire* 278-279, Art. CI (1891).

¹⁶⁹ See the Declaration on Friendly Relations *supra* (n29).

¹⁷⁰ UN Secretary-General Ban Ki-Moon criticized the adoption of ‘increasingly restrictive European asylum policies,’ specifically the adoption by the Austrian parliament, of legislation allowing for the government to declare a state of emergency based on significant irregular migration. If invoked, the legislation will prompt border security to deny irregular migrants, including asylum seekers, access to Austrian territory. See Patrick Kingsley ‘Ban Ki-moon attacks “increasingly restrictive” EU asylum policies’ *The Guardian* 28 April 2016, available at <https://www.theguardian.com/world/2016/apr/27/austria-set-to-bring-in-stringent-new-law-on-asylum-seekers>, accessed on 5 May 2017.

¹⁷¹ Hannah R Garry ‘The Right to Compensation and Refugee Flows: A “Preventative Mechanism” in International Law?’ (1998) 10 *IJRL* 97-117 at 105.

In this section, the direct or indirect act of persecution has been established as being internationally wrongful. The following section will establish the rights of the individual refugee to compensation.

V THE RIGHT OF THE INDIVIDUAL REFUGEE TO COMPENSATION

The United Nations General Assembly Resolution 194 (III) of December 11, 1948, states that ‘compensation should be paid for the property of those [refugees] choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible...’ The Resolution also established the Conciliation Commission, with the objective to facilitate the payment of compensations to Palestinian refugees. Luke Lee maintains that the wording of the Resolution, in that compensation shall be made in accordance with ‘... principles of international law or in equity,’ must be interpreted as a reference to a pre-existing rule of international law.¹⁷² Even without this argument, there is a strong case to be made for the right of refugees to compensation as a rule of customary international law. The Statute of the International Court of Justice (ICJ) defines customary international law as ‘a general practice accepted as law,’¹⁷³ which the court repeatedly has defined as a ‘settled practice’ observed by States in combination with ‘*opinio juris*.’¹⁷⁴

While GA Resolutions generally are legally non-binding, scholars agree that the ‘repeated affirmation of a resolution by unanimous or overwhelming majorities of the General Assembly endows [the resolution] with an acquired legal character, particularly when it reflects the parallel development of state practice on the issue,’¹⁷⁵ thus painting GA Resolution as evidence of *opinio juris*. The notion that responsible Governments are obliged to compensate refugees for their loss of property has been

¹⁷² Luke T Lee ‘The Preventative Approach to the Refugee Problem’ (1991-1992) *Willamette Law Review*, Vol. 28 821-833 at 829. See also Michael Lynk ‘The Right to Restitution and Compensation in International Law’ (2003) 21 *Refuge* No 2 96-113 at 100.

¹⁷³ United Nations *Statute of the International Court of Justice*, 18 April 1946, Article 38.

¹⁷⁴ See *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* 2012 ICJ Reports 99 at 27.

¹⁷⁵ Lynk op cit (n172) 101.

reaffirmed with both great consistency and widespread acceptance in a high number of GA resolutions.¹⁷⁶

Moreover, the ICCPR guarantees both a right to remedy¹⁷⁷ while it demands that victims of injustices ‘shall be compensated according to law.’¹⁷⁸ The collective weight of the recurring and near unanimously passed GA Resolutions, coupled with regional conventions enshrining the right to compensation for human rights that are violated through persecution, as well as the conclusion of the ICCPR as a binding treaty, confirm the principle of compensation in international law, and paint the right of refugees to compensation as a rule of international law.¹⁷⁹

In 1993, the International Law Association adopted the Declaration of Principles of International Law on Compensation to Refugees (DPILCR). While the principles are not legally binding, they are based on the numerous GA Resolutions expressing the right of refugees to compensation as a principle of customary international law.¹⁸⁰ Principle 1 of the Declaration stipulates that the primary responsibility to provide compensation rests with countries that ‘directly force their own citizens to flee and/or remain abroad as refugees.’ The principle includes the responsibility of ‘paying adequate compensation to refugees,’ regardless of the relief and support the refugee might receive by third States or international organisations. Principle 2 establishes the act of generating refugees as an internationally wrongful act, obligating the responsible State to ‘make good the wrong done.’

(i) Regional legislation and practice affirming the right of individual refugees to compensation

The American Convention on Human Rights¹⁸¹ (ACHR) provides a regional, legal right for refugees to compensation from their home States. Article 11 (2) protects nationals of member States from ‘arbitrary or abusive interference with [the citizen’s] private life, his family, his home ...’ while Article 21 (1) enshrines the ‘right to the

¹⁷⁶ Resolution 194 has been reaffirmed on an annual basis, and the total of reaffirmations and referrals are above 140. See Lynk op cit (n172) 101.

¹⁷⁷ ICCPR supra (n160) Article 2 (3)

¹⁷⁸ Ibid Article 14 (3).

¹⁷⁹ Lynk op cit (n172) 99.

¹⁸⁰ Ibid at 101.

¹⁸¹ Organization of American States *American Convention on Human Rights*, ‘Pact of San Jose’, Costa Rica, 22 November 1969.

use and enjoyment of property.’ Article 22 prescribes the freedom of movement. All of these rights are, as established above, effectively violated when State persecution leads to forced displacement. Furthermore, Article 64 of the ACHR stipulates that if the IACHR concludes that a violation of the rights of the Convention has taken place, it shall ‘rule that the injured party be ensured the enjoyment of his right ... that was violated’ while ‘... if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.’

In the 1989 case of *Velasquez-Rodriguez v Honduras*, the IACHR considered a case of disappearances of Honduran citizens under the ACHR. The court found Honduras responsible for the disappearances and maintained that

Reparation for harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violence, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.¹⁸²

The case reflects the principle, as laid out above, that States which are found responsible for breaches of human rights, are liable to provide full restitution, and compensation where restitution is not possible.¹⁸³ While the case did not specifically pertain to the situation of refugees, the general obligation of responsible States to provide restitution to victims of human rights violations applies to the situation of the refugee, as shown above.

The African Charter on Human and Peoples’ Right specifically guarantees the right to property¹⁸⁴ and the right to freedom of movement and residence within one’s home State.¹⁸⁵ Article 27 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights (African Protocol) prescribes that the court, in the case where it finds ‘that there has been [a] violation of a human or peoples’ right, ... shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.’

¹⁸² *Case of Velasquez-Rodriguez v Honduras* supra (n155) para 26.

¹⁸³ Lynk op cit (n172) 102.

¹⁸⁴ Organization of African Unity *African Charter on Human and Peoples’ Rights*, ‘Banjul Charter’, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) Article 14.

¹⁸⁵ Ibid Article 12.

The European Court of Human Rights (ECtHR) has in a number of cases established the right of refugees to compensation for the loss of, or the denial of access to properties. In the 1996 decision of *Loizidou v Turkey*, a Cypriot national, Mrs. Loizidou, claimed satisfaction for the denial of access to her home in the district of Kyrenia, a deprivation she had suffered since the Turkish invasion of the island in 1974. The court asserted that Mrs. Loizidou had ‘effectively lost all control over, as well as all possibilities to use and enjoy, her property,’¹⁸⁶ and that the Turkish denial of her access to her properties constituted a breach of the right to peaceful enjoyment of one’s property, as prescribed by Article 1 of Protocol 1 to the European Convention on Human Rights¹⁸⁷ (ECHR).

In 1998, the court decided on the question of just satisfaction, concluding that Mrs. Loizidou was still the legal owner of the properties in question and that compensation was to be awarded for her loss of access under then Article 50 (currently Article 41) of the ECHR, which provides that

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

The court awarded compensation for both pecuniary and non-pecuniary damages,¹⁸⁸ and Turkey eventually paid a compensation of €1.12M to Mrs. Loizidou.¹⁸⁹

In the 2003 ECtHR decision of *Demades v Turkey*, the court found that Turkey had violated the applicant’s right to respect for his home¹⁹⁰ as the policies of the Turkish Republic of North Cyprus denied displaced persons from making use of, or visiting their houses and homes in North Cyprus.¹⁹¹ The court also concluded that Article 1 of Protocol 1 had been continuously violated by denying the applicant his entitlement to ‘peaceful enjoyment of his possessions,’ leaving Turkey with a

¹⁸⁶ *Loizidou v Turkey* 1996 ECtHR Application No 40/1993/435/514 para 62.

¹⁸⁷ *European Convention for the Protection of Human Rights and Fundamental Freedoms* supra (n110).

¹⁸⁸ *Loizidou v Turkey* supra (n186) paras 34 and 40.

¹⁸⁹ See Damien McElroy ‘Turkey ordered to pay €90 million compensation for Cyprus invasion’ *The Telegraph* 12 May 2014, available at <http://www.telegraph.co.uk/news/worldnews/europe/cyprus/10825981/Turkey-ordered-to-pay-90-million-compensation-for-Cyprus-invasion.html>, accessed on 14 July 2017.

¹⁹⁰ *European Convention for the Protection of Human Rights and Fundamental Freedoms* supra (n110) Article 8.

¹⁹¹ *Demades v Turkey* 2003 ECtHR 16219/90 Merits, para 172.

responsibility to provide the applicant with ‘just satisfaction’ as prescribed by Article 41 of the ECHR. Furthermore, the court found that the applicant was entitled to ‘a measure of compensation in respect of losses directly related’ to the violation suffered though the denial of access to and control of his property,¹⁹² and awarded a total of €840,000 for pecuniary and non-pecuniary damages while emphasising that the applicant was still the sole legal owner of the properties in question.¹⁹³

The cases mentioned above clearly show how refugees have a right to compensation for properties seized, lost or destroyed under the ECHR. While the cases before the ECHR both concern situations of direct coercion commissioned by the Turkish government, the conclusion of the IACHR in the case of *Velasquez-Rodriguez v Honduras* show how indirect coercion can render a State liable to pay compensation.¹⁹⁴

As established in this section, the individual refugee has a legal claim to compensation for property lost as a result of persecution. The following section will explore the access of refugees to legal remedies which may help them attain such compensation.

VI ACCESS TO LEGAL REMEDIES FOR INDIVIDUAL REFUGEES

As the ICJ does not accept claims by individuals,¹⁹⁵ refugees must seek redress through regional or national remedies. National remedies are, however, largely unavailable to refugees as they by definition¹⁹⁶ have left their home country. Moreover, where the State acts as persecutor it is highly unlikely that a claim before its courts would be a viable option.

The IACHR does not accept complaints from individuals, and would as such be unavailable to refugees seeking compensation for lost property,¹⁹⁷ except for in cases where the home State of the applicant lodges an application against another member State. As the refugeehood stems from the commissions of the State of origin, this preclude out this mechanism of redress. As such, the ACHR does not effectively

¹⁹² Ibid, Just Satisfaction para 24.

¹⁹³ Ibid, paras 23 to 25.

¹⁹⁴ See above under Section IV.

¹⁹⁵ ICJ Statute supra (n173) Article 35 (1).

¹⁹⁶ 1951 Convention supra (n3) Article 1 (A) (2).

¹⁹⁷ ACHR supra (n181) Article 61 (1).

protect the interest of refugees. The Inter-American Commission on Human Rights does, however, accept complaints directly from individuals against States that have ratified the ACHR. While the decisions made by the Commission is only recommendatory, the Commission may in particular situations seize the court, which judgments are binding.¹⁹⁸

The African Court on Human and Peoples' Rights accept individual complaints as in accordance with the requirements set out in Article 34 (6) of the African Protocol. However, the Protocol requires that the respondent State has declared its acceptance of such individual complaints. Currently, only 24 African States have ratified the Protocol, and per 21 October 2011, only Ghana, Tanzania, Mali, Malawi and Burkina Faso have made the necessary declaration allowing for individual complaints.¹⁹⁹

As per Article 34 of the ECHR, 'the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols,' thus allowing displaced persons to seek compensation directly before the ECtHR. However, this opportunity only applies to applications against member States of the ECHR.

This section has explored some of the legal remedies available to individual refugees. The following section will explore the right of asylum States to compensation.

VII THE RIGHT OF ASYLUM STATES TO COMPENSATION

Already in 1939, the British lawyer RY Jennings held that refugee generating States were under a legal obligation to compensate asylum States for their financial burdens.²⁰⁰ As established above under section IV, the act of creating refugees through the forced displacement of persons constitutes an international wrongful act, due to the financial and socio-political burdens this imposes on the receiving State. As

¹⁹⁸ Ibid Article 63 (2).

¹⁹⁹ See African Commission on Human and Peoples' Rights webpage, available at www.achpr.org/about/afchpr/, accessed on 2 July 2017.

²⁰⁰ R Yewdall Jennings 'Some International Law Aspects of the Refugee Question' (1939) 20 *BYIL* 98-114 at 112.

established under the abovementioned section, such acts require the commissioning State to make good on the wrong done through restitution or compensation.

In the *Chorzów Factory case*, the Permanent Court of International Justice (PCIJ) decided on the question of restitution for an expropriated German factory within Polish territory. The court held that reparation ‘must, as far as possible, wipe out all the consequences of the illegal act and establish the situation which would, in all probability, have existed if the act had not been committed.’ The case illustrates how reparation is a natural legal consequence of international wrongful acts. However, the *Chorzow case* dealt with illegal expropriation in breach of a treaty, while the question of compensation for financial costs due to the reception of refugees is based on the wrongful act of violating the sovereign right to territorial integrity.

The *Trail Smelter Arbitration* gives an example of State responsibility established due to the violation of the right to territorial integrity. In 1965, the USA successfully sued Canada for damages to land, crops, and trees in the State of Washington, caused by transboundary pollution produced by an ore-smelter located in British Columbia. The ICJ held that

Under the principles of international law ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.²⁰¹

The court found Canada responsible under international law for allowing the fumes to cross into the USA, thus creating damages to US territory without its necessary consent. While fumes and refugees are essentially different, the general principle that no State may use its territory to the detriment of the rights of other States can be distilled from the decision.²⁰² This principle is applicable to the situation where a State through action or omission forces its nationals to cross into the territory of another State, thus imposing financial damages on the receiving State without its consent.²⁰³

A State involved both directly and indirectly in the creation of refugees through persecution is, as established above, responsible for the violation of the sovereign equality of the receiving State. This is due to the interference a mass influx of asylum

²⁰¹ *Trail Smelter Arbitration (United States of America v Canada)* 1941 United Nations Reports of International Arbitral Awards, Vol. 3 1905.

²⁰² The principle has been reiterated in ICJ’s practice, see the *Corfu Channel Case (United Kingdom v Albania)* 1949 ICJ Reports 4.

²⁰³ Garry op cit (n171) 105.

seekers represents to the sovereign right of the receiving State ‘to decide whom they choose to admit to their territories.’²⁰⁴ The infringement on the receiving State’s right to sovereign control over its territory ‘constitutes a breach of an international obligation of the [generating] State’ not to interfere with another State’s right to territorial integrity.²⁰⁵

As of the principle of *non-refoulement*, the State which receives asylum seekers to its frontiers is expressly forbidden under international law to turn such persons away, and is obliged to protect said persons from the expulsion to any territory in which persecution may occur.²⁰⁶ While it could be argued that the principle as codified in the 1951 Convention has been accepted by most States, and that receiving States indirectly has accepted the economic burdens of potential refugees, the principle is also a non-derogatory rule of customary international law.²⁰⁷ This makes the obligation to protect asylum seekers from *refoulement* mandatory for all States, regardless of their ratification of the 1951 Convention. The refugee-generating State’s commissioning thus obligates the receiving State to take on a financial burden to which it has not consented.

As established above in section IV, such a commission constitutes an internationally wrongful act, attributable to the refugee-generating State.

(ii) *Practical application of the observations*

Applied to the current affairs of the Syrian refugee crisis, the question of State Responsibility is of both great significance and interest. Turkey has spent more than €25bn on the refugee crisis so far,²⁰⁸ hosting the greatest number of refugees worldwide,²⁰⁹ of which the vast majority come from Syria. The conflict in Syria

²⁰⁴ Nafees Ahmad ‘Refugees: State Responsibility, Country of Origin and Human Rights’ (2009) 2 *Asia-PacJ. on Hum. Rts. & L.* 1-22 at 13.

²⁰⁵ ILC Articles supra (n150) Article 2 (b).

²⁰⁶ See the 1951 Convention supra (n3) Article 33. The principle is also a rule of customary international law, applicable to all States, see Jean Allain ‘The *Jus Cogens* Nature of Non-Refoulement’ (2002) 13 *IJRL* No. 4 533-558 at 538.

²⁰⁷ Ibid, Allain.

²⁰⁸ See Cetingüleç op cit (n165).

²⁰⁹ Turkey has been the largest refugee host country since 2015, according to the UNHCR. See UNHCR ‘Global Focus 2016 Year-End Report’ available at reporting.unhcr.org/sites/default/files/pdfsummaries/GR2016-Turey.eng.pdf, accessed on 2 August 2017.

erupted after the regime of Bashar Al-Assad responded violently against peaceful protests for reform, and it is clear that these actions were undertaken by State actors, loyal to the regime of Al-Assad. These actions are thus attributable to Syria. However, due to the complex composition and the abundance of armed factions, it is difficult to determinate whether the regime is the sole reason for the immense flows of Syrian asylum seekers entering Turkey at this point. Nonetheless, The Syrian Network for Human Rights reported that 73 per cent of the civilian deaths in Syria in 2015 were attributable to the regime,²¹⁰ while a survey conducted in Germany revealed that 70 per cent of the respondents fled Syria due to the actions of the regime.²¹¹ Furthermore, in resolution 2139 of 2014, the UN Security Council ‘strongly condemns the widespread violations of human rights and international humanitarian law by the Syrian authorities.’²¹²

Given the indicators listed in the paragraph above, it is plausible that the Syrian regime is responsible for the main bulk of the atrocities committed against its population. As it is beyond the scope of this research to investigate and establish evidence of attribution, it is in the following argument presumed that the actions leading to the expulsions of Syrian citizens are in fact attributable to the Syrian regime of al-Assad.

As a logical extension of this presumption, the regime would be responsible for the mass-influx of asylum seekers to Turkey, and thus also the for the resulting financial burdens imposed on Turkey. As stipulated by Article 36 of the ILC Articles, ‘[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby...’ and the Syrian regime is thus obliged under the rules of State responsibility to compensate Turkey for the expenses the country has had in aiding Syrian refugees. As noted by the PCIJ in the *Chorzów Factory Case*, reparation ‘must, as far as possible, wipe out all the consequences of the illegal act and establish the situation which would probably have existed if the act

²¹⁰ Kerry Boyd Anderson ‘Al-Assad Regime is Main Cause of Refugee Flows’ *Gulf News* 10 January 2016 available at <http://gulfnews.com/opinion/thinkers/al-assad-regime-is-main-cause-of-refugee-flows-1.1651362>, accessed on 4 July 2017.

²¹¹ WZB Berlin Social Science Center interviewed 889 Syrians, of which 77 per cent feared arrest or kidnapping by the government. See Samuel Osborne ‘8 graphs that challenge what you think you know about Syrian refugees in Europe’ available at <http://www.independent.co.uk/news/world/europe/8-graphs-that-challenge-what-you-think-you-know-about-syrian-refugees-in-europe-a6689021.html>, accessed on 2 August 2017.

²¹² UN, Security Council Resolution 2139 (2014).

had not been committed,²¹³ illustrating the obligation to make full restitution, or compensation for internationally wrongful acts. Article 31 of the ILC Articles maintains that ‘injury includes any damage, whether material or moral caused by the internationally wrongful act of a State,’ and it is thus clear that Turkey has been injured as a result of Syrian actions. Turkey may thus invoke the liability of the Syrian regime to ‘make full reparation for the injury caused by the internationally wrongful act’ in accordance with Article 31 of the ILC Articles.

This section has established the legal right of asylum States under international law to compensation from refugee-creating States. The following section will explore some of the complaint mechanisms available to States seeking such compensation.

VIII ACCESS TO COMPLAINT MECHANISMS FOR STATES

As of Article 35 of the ICJ Statute, all State parties have access to the court, which jurisdiction ‘comprises all cases which the parties refer to it...’ However, an acceptance of jurisdiction is necessary for the court to have the jurisdiction to bind sovereign States in its decisions. Continuing the hypothetical case of Syria v Turkey as above in section VII, Syria has not given a compulsory declaration of jurisdiction to the ICJ,²¹⁴ and a case lodged by Turkey against Syria before the court would be deemed inadmissible.

Granted that the ICJ has jurisdiction based on declarations from the parties to the dispute,²¹⁵ it follows from Article 36 (2) (d) of the ICJ Statute that the court would have the material jurisdiction to decide on the extent of reparations, following of a breach of an international obligation. Furthermore, the court would have the competence to decide on cases applying ‘general principles of law recognised by civilized nations,’²¹⁶ such as the principles of State responsibility.

While the principle of sovereignty blocks the possibility of opening judicial procedures against Syria for such a claim before the ICJ,²¹⁷ Syria’s lack of a

²¹³ *Factory at Chorzów (Germany v Poland)* 1928 Permanent Court of International Justice, Series A No. 17 at 47.

²¹⁴ See International Court of Justice ‘List of States Entitled to Appear before the Court’ available at www.icj-cij.org/en/states-entitled-to-appear, accessed on 5 June 2017.

²¹⁵ Thus in accordance with Article 36 (3) of the ICJ Statute *supra* (n173).

²¹⁶ *Ibid* Article 38 (1) (c).

²¹⁷ See the case of *Jurisdictional Immunities of the State* *supra* (n174).

declaration to the ICJ does not preclude Turkey, or any State in a similar situation, from seeking other means of redress. Negotiations and voluntary arbitration are typical pacific methods of settling international claims, yet the probability of a refugee-generating State agreeing to either of these methods is tantamount to non-existent. Turkey can, however, raise complaints through its representative with the UN General Assembly.

While this section has explored some of the legal mechanisms available to States, the following section will examine the right of the UNHCR to claim and attain compensation.

IX THE RIGHT OF THE UNHCR TO CLAIM COMPENSATION

The UN, and specifically the UNHCR, operates on a budget mainly provided by donor States in its assisting and protection of refugees.²¹⁸ The success of the UNHCR in attaining restitution for financial expenses resulting from acts commissioned by refugee-creating States would provide the organisation with a necessary, just and legitimate expansion of its budget. This would in turn benefit refugees aided by the organisation.

The Statute of the Office of the United Nations High Commissioner for Refugees, adopted in General Assembly Resolution 428 (V) of December 14, 1950 provides that '[t]he United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present statute...'²¹⁹ As argued by Luke Lee, the general and broad powers entrusted on the High Commissioner makes her the 'guardian of the interests of refugees,'²²⁰ which in turn would enable the UNHCR to claim compensation on behalf of the refugees whose interests it represents. This position is substantiated by the DPILCR, which explicitly states that the UN 'may, in the discharge of its role as guardian of the interests of refugees, claim and administer compensation funds for refugees.'²²¹

²¹⁸ UNHCR list of donors, available at www.unhcr.org/donors.html, accessed on 2 July 2017.

²¹⁹ *Statute of the Office of the United Nations High Commissioner for Refugees* supra (n45) para 1.

²²⁰ Lee op cit (n149) 549.

²²¹ International Law Association supra (n158) Principle 7.

After the ICJ's advisory opinion on *Injuries Suffered in the Service of the United Nations*,²²² it is clear that the UN has the necessary legal personality to bring forth international claims, and to seek redress for damage suffered by agents of the Organisation. In the opinion, the court held it 'clear that the Organization has the capacity to bring a claim for' damages to the interests of which it is guardian.²²³ As increasing the financial clout of the UNHCR clearly is in the interest of refugees, the advisory opinion must be read as supportive of the enabling of the UN to seek compensation from refugee-creating States for financial losses inflicted on the UNHCR.

The fact that the UN and its sub-organisations have the necessary legal personality to lodge international claims does, however, not allow the institution to bring such claims before the ICJ.²²⁴ Nonetheless, the UN possesses a global, non-legal enforcement power enabling it to seek compensation regardless of this shortcoming. Through resolutions and sanctions of the Security Council (UNSC), the UNHCR may attain compensation from refugee producing States. As of Article 39 of the Charter, the UNSC 'shall determine the existence of any threat to the peace, breach of the peace, or act of aggression,' allowing the Council to make decisions as to what measures shall be taken to maintain or restore international peace and security. Furthermore, Article 41 of the Charter grant the UNSC the power to 'decide what measures not involving the use of armed force are to be employed to give effects to its decisions' made under Article 39, and it 'may call upon the Members of the United Nations to apply such measures.' Such a decision would be binding on all parties to the Charter.²²⁵

The UNSC has already applied these provisions in order to secure funds to the benefit of refugees. In 1992, the UNSC adopted Resolution 778, deciding 'that all States in which there are funds of the Government of Iraq, or its State bodies, corporations, or agencies, that represent the proceeds of sale of Iraqi petroleum or petroleum products' were to transfer these funds to an escrow account established by

²²² *Reparation of Injuries Suffered in the Service of the United Nations* 1949 Advisory Opinion ICJ Reports 174.

²²³ *Ibid* at 180.

²²⁴ The ICJ Statute *supra* (n173) Article 34 maintain that 'only States may be parties in cases before the Court.'

²²⁵ UN Charter *supra* (n30) Article 25.

the UNSC.²²⁶ Further, the resolution requested the Secretary-General to ‘ascertain the costs of United Nations activities concerning ... the provision of humanitarian relief in Iraq ...’²²⁷ and to use the funds that was not to be transferred to the Compensation Fund²²⁸ to cover ‘the costs of United Nations activities concerning the ... provision of humanitarian relief in Iraq ...’²²⁹ As of this precedent, it is clear that the UNSC has the power to compel nations worldwide to freeze relevant assets of the refugee-creating State, and to implement them in a useful and constructive manner by strengthening the humanitarian operations of the UNHCR. This would, naturally, bolster the international protection of refugees, while simultaneously alleviating asylum States from some of their financial burdens.

X CONCLUSIONS

As shown in this chapter, rules of both regional and universal human rights law are violated when States persecute nationals. Furthermore, this chapter has established that the resulting expulsion of, or escape by the persecuted persons from the territory of the persecuting State results in a violation on the part of the generating State under international law, as transboundary forced displacement violates the territorial integrity of the receiving State. This violation makes the generating State liable, and thus responsible for the compensation for financial damages suffered by the receiving State.

While the individual refugee can seek compensation through regional courts, only nationals of signatory States to the ECHR can file an application directly to a supra-national judicial organ that is able to give decisions which are legally binding on the generating State.

Receiving States may invoke the responsibility of liable States and claim compensation through judicial proceedings before ICJ, provided that the injuring State

²²⁶ UN, Security Council Resolution 706 & 712 (1991).

²²⁷ UN, Security Council Resolution 778 (1992) para 5 (b).

²²⁸ The United Nations Compensation Commission (UNCC) was established under UNSC Resolution 687 (1991) para 18. The UNCC was to use Iraqi assets to compensate for ‘injury to foreign Governments, nationals, and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.’ (Para 16.) The UNCC has so far paid out about \$47.8bn in compensation awards. See United Nations Compensation Committee webpage, available at www.uncc.ch, accessed on 2 August 2017.

²²⁹ UN, Security Council *supra* (n227) para 5 (b) (ii).

has given a declaratory jurisdiction to the court. There are nonetheless, as indicated, non-judicial methods which States can apply when seeking redress.

Finally, the UNHCR has through the UN, as established by the *Reparations of Injuries Suffered in the Services of the United Nations*, the competence to raise international claims of compensation for expenditure against the refugee-creating State.²³⁰ The UNCHR may also appeal to the UNSC to decide on a Charter Chapter VII resolution to freeze and draw compensation from the generating State's assets.

While the legal basis of the right to compensation is clear as to the legal instruments, the issues of enforcement constitute the greatest obstacle when considering a claim for compensation. Nonetheless, the possibility of claiming compensation from refugee-creating States is a welcome and morally justifiable claim, which could restore some of the judicial and economic imbalances that the lack of obligations and responsibility on part of States generating refugees through the violation of human rights and international law constitute. With improved access to judicial procedures and enforcement mechanisms, the rights enshrined in the various instruments examined in this chapter, could prove to form effective disincentives for States persecuting their citizens.

CHAPTER 5: THE OBLIGATIONS OF STATES TO RESCUE AND DETERMINE THE STATUS OF ASYLUM SEEKERS IN DISTRESS AT SEA

I INTRODUCTION

The arrival of asylum seekers by way of sea is certainly not a modern phenomenon, although the unprecedented numbers arriving on European shores might be. The year 2015 saw more than a million migrants landing on European beaches and ports,²³¹ and the plastic dinghies often utilised are neither of the size nor sturdiness required to

²³⁰ Lee op cit (n149) 564.

²³¹ UNHCR 'Mediterranean death toll soars, 2016 is deadliest year yet' *UNHCR* 25 October 2016, available at <http://www.unhcr.org/afr/news/latest/2016/10/580f3e684/mediterranean-death-toll-soars-2016-deadliest-year.html>, accessed on 23 April 2017.

safely undertake journeys across rough seas.²³² The death-toll of the Mediterranean Sea in recent years serves as a testimony to the danger that irregular sea-borne routes represent to the lives of the people who undertake them.²³³

These perilous journeys, undertaken as a desperate measure in the quest for safety from persecution, make the obligations of States to effect rescue operations a particularly pertinent topic. With no universal framework for the fair distribution of responsibilities for refugees, the complex and contested issues of State responsibilities to process asylum applications in the wake of rescue- and interdiction operations are of equal relevance.

This chapter will principally argue that coastal States are obliged to disembark asylum seekers rescued at sea, and to determine their refugee status. The chapter consists of seven subsections. The following section will discuss the duty of States to rescue asylum seekers at sea, while the third section will examine the obligation of coastal States to allow for the disembarkation of rescued asylum seekers. The fourth section will explore the principle of *non-refoulement* as a doorway to disembarkation and status determination processes, while the fifth section will offer a practical application of the observations made in this chapter. The sixth and final section will summarise the observations made.

II THE DUTY TO RESCUE ASYLUM SEEKERS IN DISTRESS AT SEA

The duty to rescue persons in distress at sea is an age-old rule of customary international law,²³⁴ and the principle is codified in, among other Conventions, the

²³² In May 2017, the EU asked China to stop its sale of rubber dinghies, as these are the most common mode of transportation across the Mediterranean. See Illaria Maria Sala ‘Not too Solid’ *Quartz* 5 May 2017, available at <https://qz.com/976821/europe-has-a-solution-to-its-refugee-arrivals-stop-the-sale-of-rubber-dinghies-in-china/>, accessed on 1 August 2017.

²³³ United Nations reports that more than five thousand people lost their lives attempting to cross the Mediterranean in 2016. See Nick Cumming-Bruce “‘Worst Annual Death Toll Ever’: Mediterranean Claims 5,000 Migrants’ *NY Times* 23 December 2016, available at <https://www.nytimes.com/2016/12/23/world/europe/migrant-death-toll-mediterranean-europe.html>, accessed on 4 August 2017.

²³⁴ See the dicta of Cockburn, CJ in Supreme Court of Canada *Scaramanga v Stamp* 1880 5 CPD 295, 304.

1982 Convention on the International Law of the Sea²³⁵ (UNCLOS). Article 58 (2) and 98 (1). The latter provision stipulates that

Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers ... to render assistance to any person found at sea in danger of being lost ... and to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may be reasonably be expected of him.

As per the ordinary meaning of the provision's wording, it is clear that the flag State is under a positive legal obligation to have all ships flying its flag render assistance to anyone in such need, irrespective of the distressed individuals' nationality or migratory status.²³⁶ The UNCLOS, as well as the International Convention on the Safety of Life at Sea²³⁷ (SOLAS) and the International Convention on Maritime Search and Rescue²³⁸ (SAR) — all legally binding instruments — provide clear obligations to render assistance to all persons in distress at sea.²³⁹ Yet, this most fundamental rule protecting the safety of life at sea has, unfortunately, been broken in both the distant and recent past, vis-à-vis asylum seekers in distress at sea.

Ordinary seafarers in distress who are rescued, repatriate without difficulty after they are disembarked from the rescuing vessel. Asylum seekers who, due to a fear of persecution are unwilling to repatriate, represent a burden which States, *in lieu* of clear rules for the international distribution and sharing of the burden of refugees are inclined to attempt to avoid, by the simple yet effective measure of denying disembarkation of the rescued asylum seekers. As negotiations for the disembarkation of asylum seekers often is a lengthy process,²⁴⁰ the delay causes disincentives for shipmasters and –owners to render assistance to asylum seekers and migrants in distress at sea, increasing the risk for loss of lives. Two examples will illustrate the

²³⁵ United Nations, General Assembly *Convention on the Law of the Sea* 10 December 1982, 1833 UNTS 3.

²³⁶ Such an interpretation is in line with the Vienna Convention *supra* (n31) Article 31 (1).

²³⁷ International Maritime Organization, *International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 UNTS 3.

²³⁸ International Maritime Organization, *International Convention on Maritime Search and Rescue* 27 April 1979, 1403 UNTS 97.

²³⁹ The SOLAS *supra* (n237) reiterates the obligations of shipmasters to render assistance to persons in distress, see Regulation 10 (a).

²⁴⁰ As was the case of *Marine I*, which rescued some 300 applicants off the coast of Senegal. An agreement between Spain, Senegal, and Mauritania was reached two weeks after the distress call was made. See Jasmine Coppens & Eduard Somers 'Towards New Rules of Disembarkation' (2010) 25 *IJMCL* 377-403 at 379.

additional layer of danger added to situations of distress at sea faced by asylum seekers.

During the Indo-Chinese mass exodus in the late 1970s and -80s, boat people were fleeing the Vietnamese communist regime. The number of asylum seekers in refugee camps in the neighbouring coastal States steadily increased, while large vessels were chartered by smuggling syndicates to bring asylum seekers by the thousands per ship.²⁴¹ This, in turn, spiked local hostility towards asylum seekers. The towing of vessels carrying asylum seekers back to the high seas became a measure increasingly utilised to avoid responsibility for additional asylum seekers,²⁴² and commercial vessels were denied the disembarkation of rescued protection seekers. The delays incurred on the part of commercial vessels caused financial losses for ship-owners, and in between September and October 1979, 80 to 90 per cent of commercial vessels in the region ignored emergency calls from vessels in distress.²⁴³

Another, more recent illustration is the testimony of Abassi, a 21-year old Nigerian migrant who recounted to Human Rights Watch how he alongside 85 other people clung to an inflatable boat for five days in the Mediterranean, awaiting rescue. Both a helicopter and a ship passed them without rendering assistance of any kind, and three people died.²⁴⁴

These unsettling examples arguably result from the lack of a clear obligation on coastal States to allow for disembarkation of rescued asylum seekers in international legal instruments, and are symptomatic of the lack of a burden-sharing system in international refugee law.

As shown in this section, all vessels are obliged to aid asylum seekers in distress at sea. The following section will examine the obligation of coastal States to disembark rescued asylum seekers.

²⁴¹ UNHCR 'The State of the World's Refugees 2000' at 82, available at <http://www.unhcr.org/3ebf9bad0.pdf>, accessed on 4 August 2017.

²⁴¹ Ibid at 87.

²⁴² Ibid at 87.

²⁴³ UNHCR 'Problems Related to the Rescue of Asylum Seekers in Distress at Sea' EC/SCP/18, 26.08.1981, para 7, available at <http://www.unhcr.org/excom/scip/3ae68ccc8/problems-related-rescue-asylum-seekers-distress-sea.html>, accessed on 3 July 2017.

²⁴⁴ Coppens & Somers op cit (n240) 381.

III THE OBLIGATION TO ALLOW DISEMBARKATION OF ASYLUM SEEKERS

As the very lives of migrants attempting to reach the shores of developed countries often depend on commercial and State vessels effecting rescue operations, it is self-evident that clear rules which minimise incentives for shipmasters and –owners to act in contradiction to the obligation to rescue are imperative for the prevention of tragic and unnecessary loss of life.

As the inadequacy of the legal framework on rescue at sea of asylum seekers was highlighted yet again in 2001 by the *Tampa* incident, the International Maritime Organization (IMO) called for a review of the existing legal instruments to eliminate gaps and inconsistencies.²⁴⁵ As a result, both the SOLAS and the SAR Conventions were amended in 2004.²⁴⁶ The SOLAS amendment obliges the signatory States to

co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations *with minimum further deviation from the ship's intended voyage*, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered *shall exercise primary responsibility* for ensuring that such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Contracting Governments *shall arrange* for such disembarkation to be effected as soon as reasonably practicable.²⁴⁷ (Emphasis added.)

As of the wording of this amendment, the disembarkation of rescued persons shall take place at the next port of call, a practice which constitutes the common procedure in cases of ordinary rescued persons.²⁴⁸ This effectively minimises delays and financial losses on the part of the rescuing vessel. This is, in turn, mutually beneficial to would-be rescuees, as the economic rationale for ignoring distress calls is minimised.

Unfortunately, the amendment simply delegates ‘primary responsibility’ for the deliverance of rescued persons to a ‘place of safety,’ a wording which hardly

²⁴⁵ Ibid at 383.

²⁴⁶ International Maritime Organization, Resolution MSC.153(78), *Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974*, 20 May 2004 and Resolution MSC.155(78), *Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979*, 20 May 2004.

²⁴⁷ Ibid, Resolution MSC.153(78) para 3.1.9.

²⁴⁸ Cecilia Bailliet ‘The Tampa Case and its Impact on Burden Sharing at Sea’ (2003) 25 *HumRtsQ* 741-774 at 755.

places a positive legal duty on the responsible SAR nation to allow for disembarkation in its own ports. While one can find some support for the notion that the responsible SAR nation is obligated to accept disembarkation in the IMO Facilitation Committee's Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea, the wording does not carry the semblance of a positive legal obligation, but rather that of a mere recommendation. The Principles state that if 'disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the Search and Rescue area should accept the disembarkation of the persons rescued.'²⁴⁹ In addition to the recommendatory nature of the wording, the Principles are themselves not legally binding.²⁵⁰

As the disembarkation of rescued asylum seekers requires access to ports, the natural point of departure for an analysis of a duty to allow disembarkation would be the one of foreign ships' access to the ports of coastal States. As ports are under the territorial sovereignty of the coastal State, the State has a right to regulate the entry of foreign ships,²⁵¹ a position substantiated by the International Court of Justice (ICJ) in the case of *Nicaragua v the United States of America*.²⁵²

It is, however, generally recognised as a rule of customary international law that vessels in distress, for humanitarian and safety reasons have 'a right of entry to any foreign port.'²⁵³ As noted by Churchill and Lowe, 'If a ship needs to enter a port or internal waters to shelter in order to preserve human life, international law gives it a right of entry.'²⁵⁴ According to the SAR Convention, a vessel is in distress when 'there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance.'²⁵⁵

As commercial vessels which have rescued tens or hundreds of people seldom are equipped or stocked for the nutritional and medical needs of people who might be

²⁴⁹ See International Maritime Organization, *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea* 22 January 2009, FAL.3/Circ.194, Principle No 3.

²⁵⁰ Douglas Guilfoyle & Efthymios Papatavridis 'Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea' *UNHCR 2014 Background Paper* at 5, available at <http://www.refworld.org/pdfid/5346438f4.pdf>, accessed on 21 July 2017.

²⁵¹ Yoshifumi Tanaka *The International Law of the Sea* (2012) 80.

²⁵² *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* 1986 ICJ Reports 111 para 213; 'it is also by virtue of its sovereignty that the coastal State may regulate access to its port.'

²⁵³ Tanaka op cit (n251) 81.

²⁵⁴ Churchill, R & V Lowe *The Law of the Sea* 3ed (1999) 63.

²⁵⁵ SAR supra (n238) Annex chapter 1.3.11.

in dire need of medical attention, the entry to a port may quickly become imperative for the preservation of human life. Such a situation would thus override the principle of sovereignty, and allow the ship to seek refuge in any port.

However, a coastal State attempting to avoid the reception of a rescuing vessel into its ports might seek to alleviate the factors creating the situation of distress on the rescuing vessel. In the *Tampa* incident, 438 persons had been rescued from a sinking fishing vessel, of which fifteen were unconscious, one child was sick, one person had suffered a broken leg and a great many people suffered ‘open sores and skin infections.’²⁵⁶ Clearly, many of the rescued persons aboard were in acute need of medical attention. Captain Rinnan of the *Tampa* saw no other option but to enter the Australian port of Christmas Island. Shortly after entering Australian territorial waters, the ship was boarded and seized by the Australian Special Air Services.²⁵⁷ Save for this interception by Australian military forces, the *Tampa* would, due to the ‘grave and imminent danger’ to the health and lives of the rescued persons aboard, be within its right according to customary international law in entering the port.

However, this rule does not automatically settle the question of disembarkation of the asylum seekers on board the vessel. Neither does the rule touch on that of State responsibilities for determining the refugee status of persons on board the vessel.

IV THE PRINCIPLE OF *NON-REFOULEMENT* AS A DOORWAY TO DISEMBARKATION AND DETERMINATION PROCEDURES

The principle of *non-refoulement* constitutes the backbone of international refugee law, and is today recognised as a non-derogable rule of customary international law binding all States.²⁵⁸ Its primary wording is found in Article 33 of the 1951 Convention, which stipulates that

[n]o Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened

²⁵⁶ Parliament of Australia ‘Border Protection: A New Regime’ para 1.7, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritime_incident/report/c01, accessed on 5 August 2017.

²⁵⁷ Peter D Fox ‘International Asylum and Boat People: The Tampa Affair and Australia’s “Pacific Solution”’ (2010) 25 *Md.J.Int’l.L.* 356 at 357.

²⁵⁸ Allain op cit (n206) 538.

on account of his race, religion, nationality, membership of a particular social group or political opinion.

The application of the principle has traditionally been understood as being limited to the protection of refugees²⁵⁹ who find themselves within the territorial jurisdiction of a member State to the 1951 Convention. This is a consequence of the concept of jurisdiction under public international law traditionally having been ‘regarded as territorial in nature.’²⁶⁰ As the internal waters and territorial sea of a coastal State are within the sovereign jurisdiction of the coastal State,²⁶¹ it is clear that a rejection from port which may lead to persecution is included within the prohibitory scope of the principle of *non-refoulement*. Such a conclusion must also be drawn from the broad wording of Article 33 (1) itself, which proscribes *refoulement* in ‘any manner whatsoever.’²⁶²

The principle of *non-refoulement* as stipulated in Article 33 (1) does not contain any spatial restrictions. On the contrary, the provision prohibits any State action leading to *refoulement* ‘in any manner whatsoever.’ The broad wording clearly prohibits any form of expulsion *from anywhere*, strengthening the notion that the principle applies extraterritorially. A teleological interpretation of the Article provides further support; as the object of the principle is to protect refugees, the very purpose of the principle would be frustrated if it was to be fitted with geographical limitations.

Moreover, the corresponding principle in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), as well as the International Convention on Civil and Political Rights (ICCPR) applies extraterritorially and must be respected by the coastal State in all its actions.²⁶³ As human rights instruments are to be interpreted in light of relevant societal and legal developments,²⁶⁴ the extraterritorial application of the principle as evidenced by the

²⁵⁹ As defined by Article 1 (A) (2) of the 1951 Convention *supra* (n3).

²⁶⁰ Seunghwan Kim ‘Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context’ (2017) 30 *LJIL*, Issue 1 49-70 at 51.

²⁶¹ UNCLOS *supra* (n235) Article 2 (1).

²⁶² This understanding has support among prominent scholars, eg Goodwin-Gil & McAdam *op cit* (n20) 246. See also Sir Elihu Lauterpacht and Daniel Bethlehem ‘Non-Refoulement: Opinion’ in Feller, Türk & Nicholson (eds.) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) 89-171 para 67.

²⁶³ Andreas Fischer-Lesano, Tillmann Löhr & Timo Tohidipur ‘Border Controls at Sea’ (2009) 21 *IJRL* 256-296 at 272.

²⁶⁴ See *Hirsi Jamaa and Others v Italy* 2012 ECtHR Application No 27765/09, Concurring Opinion of Judge Pinto de Albuquerque at 62.

later CAT and the ICCPR, ratified by the very States which have ratified the 1951 Convention, lend interpretational support to the extraterritorial application of Article 33 (1). Consequently, the principle of *non-refoulement* applies ‘anywhere that a State exercises jurisdiction over an asylum-seeker.’²⁶⁵

While the US Supreme Court, in *Sale v Haitian Centers Council, Inc.*²⁶⁶ sustained the interpretation of the US administration in that the principle only applies within the territorial jurisdiction of the USA, the Inter-American Commission on Human Rights found the US’ program of interdiction and return of asylum seekers without screening procedures to constitute a violation of both the principle of *non-refoulement* under the 1951 Convention, and of the applicants’ right to life, liberty and security as stipulated by the American Declaration of the Rights and Duties of Man.²⁶⁷ The position held by the Commission reflects that of Goodwin-Gil and McAdam, in that the principle of *non-refoulement* applies to State action ‘wherever it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction.’²⁶⁸

Accordingly, the coastal State exercises territorial jurisdiction over asylum seekers on board distressed vessels that are seeking refuge within its ports. However, the State may also exercise personal jurisdiction over asylum seekers in both national and international waters.

As established by the ICJ, a State exercises jurisdiction over and is legally responsible for actions which the State has ‘effective control’ over.²⁶⁹ When asylum seekers are rescued or interdicted by State actors, the action is attributable to the State. Furthermore, there can be no doubt about the control exercised by coast guard or navy members over asylum seekers interdicted or rescued from the sea being effective. Consequently, the applicants are under the jurisdiction of said State, a notion supported by the fact that the applicants in their escape from persecution are actively

²⁶⁵ Killian S O’Brien ‘Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem’ (2011) 3 *GoJIL* 715-732 at 728. This interpretation is also supported by the ECtHR in the European context, see *Hirsi Jamaa and Others v Italy* 2012 ECtHR Application No 27765/09.

²⁶⁶ *Sale v Haitian Centers Council, Inc.* 1993 509 US Supreme Court 155.

²⁶⁷ Inter-American Commission on Human Rights, Report No. 51/96, Decision of the Commission as to the Merits of Case 10.675, United States (13.3.1997) para 158.

²⁶⁸ Goodwin-Gil & McAdam op cit (n20) 248.

²⁶⁹ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* 1986 ICJ Reports 111 para 115.

attempting to submit themselves to a jurisdiction other than their own.²⁷⁰ The principle of *non-refoulement* thus applies both to applicants in port and to applicants interdicted or rescued by the coastal State.

Once the principle of *non-refoulement* is activated due to the claimant being under the jurisdiction of a State while ‘outside the country of [her] nationality,’²⁷¹ the State is obligated both by Article 33 (1) and by customary international law not to return her to a territory where persecution might ensue. The coastal State must ascertain that a rejection from port or a push-back will not result in *refoulement*, by in the very least assessing the individual applicant’s fear of persecution.

As persecution is the essential defining element of refugeehood under the 1951 Convention Article 1 (A) (2), the assessment of the applicant’s well-founded fear of persecution will in effect constitute an invariable part of the refugee determination process. Indeed, Alice Edwards notes that a conjunctive reading of Article 1 and 33 of the 1951 Convention obligates the State which exercises jurisdiction over the asylum seekers to grant claimants ‘at a minimum, access to asylum procedures for the purpose of refugee status determination.’²⁷²

Further support for the notion that an individual assessment is required for the coastal State to avoid *refoulement* of asylum seekers can be found in Article 33 of the 1951 Convention itself. While no derogation from the principle of *non-refoulement* is permitted, the second paragraph of the provision allows for exceptions where ‘reasonable grounds for regarding [the asylum seeker] as a danger to the security of the country’ can be established, or in cases where the applicant has been ‘convicted by a final judgment of a particularly serious crime.’²⁷³ Such exceptions can only be made based on individual assessment, establishing the potential disruptiveness of the individual applicant.²⁷⁴

Moreover, the CAT obliges member States not to ‘expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing

²⁷⁰ O'Brien op cit (n265) 728.

²⁷¹ 1951 Convention supra (n3) Article 1 (A) (2).

²⁷² Alice Edwards ‘Human Rights, Refugees, and The Right “To Enjoy” Asylum’ (2005) 17 *IJRL* 293-330 at 301.

²⁷³ 1951 Convention supra (n3) Article 33 (2).

²⁷⁴ Goodwin-Gil & McAdam op cit (n20) 235.

that he would be in danger of being subjected to torture.’²⁷⁵ The prohibition of *refoulement* to torture under CAT constitutes an expanding of the principle under the 1951 Convention in that it permits no exceptions based on assessments of State security. Similarly, Article 7 of the ICCPR, which prohibits the subjugation of anyone ‘to torture or to cruel, inhuman or degrading treatment or punishment’ is generally understood as to encompass and further the principle of *non-refoulement*.²⁷⁶

A State party to any one of these Conventions would thus be obliged to ascertain that the rejection of any individual asylum seeker would not lead to persecution under the 1951 Convention, nor torture or inhuman treatment as prohibited by the CAT or the ICCPR.²⁷⁷ These assessments demand due processes, and the applicant must in accordance with Article 16 (1) of the 1951 Convention be given the right to appeal before a court should the decision be negative.²⁷⁸

As a person is granted refugee status under the 1951 Convention because of her *de facto* circumstances,²⁷⁹ she must be assumed to be a refugee under Article 1 (A) (2) and accorded protection against *refoulement* until her claim is disproven by an official procedure.²⁸⁰ As the State in effective control of the asylum seeker must provide ‘access to official proceedings in order to verify her refugee status’²⁸¹ — procedures which can only be completed on land²⁸² — the State will by all practical means be obliged to allow disembarkation in order to fulfil its obligations under international law. Consequently, although the 1951 Convention can be said to suffer from the lack of an explicit obligation to determine the status of asylum seekers, such a duty is rendered implicit by the absolute prohibition of *refoulement*. In the European

²⁷⁵ United Nations, General Assembly *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 10 December 1984, 1465 UNTS 85 Article 3 (1).

²⁷⁶ Goodwin-Gil & McAdam op cit (n20) 209.

²⁷⁷ Thomas Gammeltoft-Hansen ‘The Refugee, The Sovereign and the Sea / EU Interdiction Policies in the Mediterranean’ in Adler-Nissen, R and T Gammeltoft-Hansen (eds.) *Sovereignty Games, Instrumentalizing State Sovereignty in Europe and Beyond* (2008) 171-197 Palgrave MacMillan, New York at 11.

²⁷⁸ Although the right to do so depends on the subject-matter jurisdiction of the court in which State the applicant find herself. See James C Hathaway *The Rights of Refugees under International Law* (2005) 645-647.

²⁷⁹ Ibid at 304.

²⁸⁰ As noted by Walter Kälin, Martina Caroni & Lukas Heim, protection from *refoulement* ‘lasts for an asylum seeker as long as his or her claim to be a refugee has not been refuted in a formal procedure by a final decision.’ See ‘Article 33, para. 1 (Prohibition of Expulsion or Return (“*refoulement*”))’ in A Zimmerman (ed.) para 87.

²⁸¹ Fischer-Lesano, Löhr & Tohidipur op cit (n263) 284.

²⁸² Goodwin-Gil & McAdam op cit (n20) 278.

context, this deduction is evidenced by the Schengen Border Code, which requires member States to implement entry controls ‘without prejudice to ... the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*.’²⁸³ In practice, the wording of the border code obliges contracting States to allow ‘temporary admission for the purpose of verifying the need for protection and the status of the person concerned.’²⁸⁴

As established in this section, the principle of *non-refoulement* can oblige the coastal State to disembark rescued asylum seekers, and to determine their status as refugees. The observations of this section will in the following be applied to two historical situations.

V PRACTICAL APPLICATION OF THE OBSERVATIONS

The Tampa Incident

On the 26 of August 2001, Norwegian cargo vessel *M/V Tampa* responded to a request from the Australian Rescue Coordination Centre to aid a sinking Indonesian fishing boat located some one hundred and forty kilometres from the Australian port of Christmas Island. The fishing boat held 438 persons headed for Australia to seek protection.²⁸⁵ Once the rescued persons were aboard the *Tampa*, licensed to carry a maximum of 50 people, captain Rinnan set for the next port of call, Singapore. The asylum seekers on board, however, feared persecution were they to be returned to Indonesia and threatened suicide if the captain persisted in bringing them there.²⁸⁶ The captain considered the situation on board to pose a significant risk of loss of life due to these threats,²⁸⁷ but also due to the general sanitary and medical situation aboard.²⁸⁸ Moreover, Indonesia had not acceded to the 1951 Convention and indicated its unwillingness to receive the asylum applicants. Consequently, captain Rinnan disregarded Australian warnings of legal proceedings against him should he bring the asylum seekers to Australian waters, and sailed for Christmas Island. As a result, the

²⁸³ European Parliament and Council *Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, OJ L 77, Article 3 (b).

²⁸⁴ Fischer-Lesano, Löhr & Tohidipur op cit (n263) 283.

²⁸⁵ Fox op cit (n257) 356

²⁸⁶ Bailliet op cit (n248) 742.

²⁸⁷ Ibid at 742.

²⁸⁸ See above, under Section III.

Tampa was boarded by 45 Australian soldiers and forced to leave the Australian territorial waters. After intense negotiations, New Zealand and Nauru offered to aid Australia in the disembarkation and processing of the asylum seekers.²⁸⁹

As outlined above under section III, the *Tampa* was, due to the immediate risk to life aboard the vessel, within its right under customary international law to enter the port of Christmas Island. As of the boarding of the *Tampa* using armed soldiers, there is no doubt that Australia had ‘effective control’ over the asylum applicants, thus activating the prohibition of *refoulement* as per the 1951 Convention and customary international law. While Australia was not automatically obliged to disembark and process the asylum seekers, Australia was legally obliged to ascertain that the transfer of the applicants to New Zealand and Nauru would not pose a risk of persecution or further deportation to the asylum seekers. While it is beyond the scope of this research to establish a breach on the part of Australia regarding the principle of *non-refoulement*, it is worth noting that Nauru at the time of receiving the applicants had legislation in place punishing homosexual activity with up to 14 years of imprisonment and hard labour.²⁹⁰ Thus, one of the countries which Australia transferred a portion of the applicants to, had legislation in place allowing for State persecution of homosexuals. Persecuted individuals of this particular social group are per definition refugees.²⁹¹ As the asylum seekers at no time were consulted about the transfer to Nauru,²⁹² Australian authorities had no way of ascertaining that none of the persons sent there did, in fact, belong to that particular social group. Australia was thus, through its transfer of the applicants to Nauru, potentially violating the principle of *non-refoulement*.

ECtHR Case of Hirsi and Others v Italy

In the 2012 case before the Grand Chamber of the ECtHR, about two hundred migrants were intercepted by the Italian State on the Mediterranean high seas. The occupants

²⁸⁹ Bailliet op cit (n248) 743.

²⁹⁰ Nauru Criminal Code 1899, Chapter XXII – Offences Against Morality, sec 208. Changed in May 2016.

²⁹¹ See the 1951 Convention supra (n3) Article 1 (A) (2), which defines a refugee as, among others, someone with a well-founded fear of persecution due to belonging to ‘a particular social group.’

Homosexuals are widely considered to constitute such a group.

²⁹² Bailliet op cit (n248) 743.

of the intercepted vessels were transferred to Italian military ships and, despite protests, returned to Libyan authorities in Tripoli.²⁹³

The court found that the applicants were ‘under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities,’ as they were taken aboard Italian-flagged military vessels.²⁹⁴ Moreover, the court unanimously concluded that Italy had violated the prohibition of torture, as well as that of inhuman and degrading treatment or punishment.²⁹⁵ Furthermore, the court maintained that the principle of *non-refoulement* as per Article 33 of the 1951 Convention applied to both rescue operations and interdictions, as shown in this chapter.²⁹⁶ The court emphasised that it was Italy’s responsibility to ascertain that the return of the migrants to Libya would not result in a risk of treatment in violation of ECHR Article 3, both in Libya and through further deportation.²⁹⁷

Judge Pinto de Albuquerque made in his concurring opinion several noteworthy observations of relevance to the observations of this chapter. First, the judge asserted, alongside an unanimous court, that the principle of *non-refoulement* applies extraterritorially, and that the principle ‘can be triggered by a breach or the risk of a breach of the essence of any’ right under the ECHR.²⁹⁸ Moreover, the judge referenced both the Inter-American Commission on Human Rights and the authors as mentioned above under section IV as examples of the extraterritorial application of the principle,²⁹⁹ before noting that the Australian and American courts’ interpretations of the principle is at variance with this position. The judge then expressly concluded that such interpretations ‘contradicts the literal and ordinary meaning of the language of Article 33’ and is thus simultaneously at variance with the VCLT, Article 1.³⁰⁰

²⁹³ Cathryn Costello ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’ (2012) 12 *HumRtsLRev* at 300.

²⁹⁴ *Hirsi Jamaa and Others v Italy*, ECtHR Application No 27765/09 para 81.

²⁹⁵ *Ibid* at 131. See also ECHR *supra* (n161) Article 3.

²⁹⁶ *Hirsi Jamaa and Others v Italy* *supra* (n294) 134 and 23.

²⁹⁷ *Ibid* at 133.

²⁹⁸ *Hirsi Jamaa and Others v Italy* *supra* (n294) Concurring opinion of Judge Pinto de Albuquerque 60.

²⁹⁹ *Ibid* at 65.

³⁰⁰ *Ibid* at 67.

V CONCLUSIONS

As shown in this chapter, flag States and coastal States are obligated to cooperate in order to rescue any person, including asylum seekers and refugees, in distress at sea. The main problem, however, is the disembarkation of rescued asylum seekers. *In lieu* of a burden-sharing agreement distributing the responsibilities for refugees and asylum seekers, and a clear legal obligation on part of the coastal State to allow disembarkation and to provide temporary refuge for the applicants, this final and essential part of the rescue operation — the deliverance of the rescued asylum seekers to a ‘place of safety’ — remains to be solved on an *ad-hoc* basis.

As highlighted in this chapter, there are particular situations in which the rescuing vessel have a right under customary international law to enter the port of any State, a right which the coastal State is obliged to adhere to. When the asylum seekers on board a rescuing vessel, by means of entering the port of a coastal State, come under the *de jure* jurisdiction of the coastal State, they are protected by the principle of *non-refoulement*. The same obligations arise when the rescuing vessel or the vessel carrying asylum seekers are interdicted by the coastal State. Interdiction or rescue leave the asylum seekers under the *de facto* jurisdiction of the coastal State, regardless of the location where the interdiction takes place. Further, this obliges the coastal State to ascertain that a rejection of the applicants, from port or from this *de facto* jurisdiction, will not result in the *refoulement* of the applicants. Such procedures demand due process, to establish the individual need for protection. Due process, in turn, demands disembarkation.

Thus, while the clarity of the international legal framework remains unsatisfactory, it has been established that the coastal State is, through a combination of convention– and customary law, obliged to allow for the disembarkation of rescued asylum seekers, and to process their applications.

CHAPTER 6: CONCLUSIONS

This dissertation has sought to provide answers to a few questions topical to the current standing of international burden-sharing in the context of refugee law. In doing so, a range of international legal instruments have been analysed, with the support of both

international judicial decisions and the work of expert scholars in the field of refugee law. The fundamental observation of the dissertation has been that although the 1951 Convention provides a generous set of rights to persecuted persons, it has, in the context of this dissertation, its primary shortcoming in its lack of clear and positive obligations which ensure a fair distribution of the burdens of refugees between the signatory States. However, regional efforts do, to a degree, mitigate this issue by establishing obligations which seek to distribute the costs and burdens of refugees. The findings and observations of the dissertation will be summarised in the following.

As examined in the second chapter of this dissertation there are, unfortunately, no universally applicable legal obligations on States to distribute the burdens of refugees and asylum seekers in an egalitarian manner, neither through the resettlement of refugees nor through financial transfers. Nonetheless, physical relocation of refugees does occur, albeit based on the political will of States. Presuming that political decisions largely is made based on perceived national benefits, Schwarzenberger's adage of self-interest being the true motivator for State cooperation³⁰¹ still rings true today.

However, on the regional level, the recent relocation decision³⁰² of the Council of the EU, which regulates a relocation of some 120 000 refugees, recognises the 'necessity of ensuring a fair distribution of [asylum] applicants among Member States.'³⁰³ Indeed, the express purpose of the decision, as evidenced by its title, is to alleviate the economic and societal pressures put on Greece and Italy by the recent mass influx of asylum seekers. Similarly, the AMIF constitute an example of a regional development in cost-sharing of the burdens of refugees, achieved through the appropriation and pooling of economic resources which are then redistributed, proportionately to the burdens shouldered by each member State. Both initiatives are legally binding and appreciate the general duty of States to cooperate,³⁰⁴ albeit in a regional context. More importantly, the initiatives recognise that the burden of refugees — though limited to the European context — must be shared in order to ensure equal and effective protection of refugees. Such initiatives are a welcome adjustment which may reduce the pressure on strained EU border States such as

³⁰¹ See Chapter 1, Section III.

³⁰² Council Decision (EU) 2015/1601 *supra* (n59).

³⁰³ *Ibid* para 34.

³⁰⁴ As outlined by the Declaration on Friendly Relations *supra* (n29). Also see Chapter 2, Section II.

Greece, while simultaneously laying a foundation for the overall improvement of reception conditions for asylum seekers in the EU. Moreover, there are signs of such initiatives spreading outside of EU territories, as evidenced by the Cotonou Agreement, in which the EU has pledged humanitarian assistance to 79 countries in order to, among other things, ‘address the needs arising from the displacement of people.’³⁰⁵

As examined in the third chapter, the practices of ‘safe third countries’ abound in the developed world, and have in the past³⁰⁶ infringed on the fundamental rights protecting persecuted persons. Unfortunately, such infringements might continue in the immediate future.³⁰⁷ *In lieu* of a refugee regime where the burdens of refugees are shared and distributed in a just and predictable manner, the concept remains an unpalatable, yet understandable method for determining the State responsible for providing asylum procedures and protection for the individual applicant. Unsurprisingly, this is to the detriment of asylum seekers and refugees, who risk *refoulement* at the hands of States attempting to shirk responsibilities and costs. Nonetheless, there is a growing recognition within the EU that such transfers need to be substantiated by sufficient guarantees of human-rights protections, as evidenced by the Dublin III and the Asylum Procedures Directive.³⁰⁸ To the contrary of these progressions, the EU is seeking to transfer asylum seekers back to Turkey, a country which in chapter three of this dissertation has been shown to not meet the very minimum standards dictated by the EU in its own regulations.

As shown in the fourth chapter, States are liable for damages attributable to their forced displacement of citizens through persecution. The chapter provided that this liability extends towards the injured individual, as well towards as the UNHCR and the receiving State. That the customary rules of State responsibility as presented by the ILC³⁰⁹ are applicable to the scenario of forced displacement, is of particular importance in the modern refugee crisis, in which twenty people are forced to flee from their homes — every single minute of the day.³¹⁰ This, in turn, leave them to rely

³⁰⁵ Cotonou Agreement supra (n66) Article 72 (1).

³⁰⁶ See the ECtHR case of *M.S.S v Greece and Belgium*, and the ECJ case of *N.S. v Secretary of State and M.E. v Refugee Applications Commissioner* in Chapter 3, Section III.

³⁰⁷ See the example of EU's agreement with Turkey in Chapter 3, Section V.

³⁰⁸ See Chapter 3, Section III.

³⁰⁹ ILC Articles supra (n150).

³¹⁰ UNHCR op cit (n14).

on what assets they are able to bring, as well as the aid provided by the UNHCR and the asylum State. Clearly, a justified compensation to any of these three parties — or all — would be most welcome.

Moreover, there are ways in which these injured parties may seek such compensation from responsible States for the loss of property and the expenses of caring for refugees, respectively. There are historical precedents for such practice,³¹¹ although enforcement mechanisms, and even supra-national judicial measures for individual refugees outside the jurisdiction of the ECtHR, are limited. Increasing the pressure on refugee-generating States by creating strong disincentives for the forced displacement of nationals is necessary in order to halt the creation of refugees, and pursuing a strategy of compensation may secure justified benefits, both for the people in need of protection, and for the States doing their humanitarian duty by extending protection, all while constituting a punitive and preventative measure against State-sanctioned displacement. Importantly, the liable State would be recognised as responsible by the international community, which arguably in itself would further increase the pressure on the State to cease or prevent the activities which lead to displacement.

As shown in the fifth chapter, States are responsible under international law for implementing legislation which obligates shipmasters flying their flag, to render assistance to asylum seekers in distress at sea. Moreover, all shipmasters are obliged to render such assistance to *all* persons in distress, regardless of their nationality or migratory status. Importantly, the principle of *non-refoulement* extends to rescued and interdicted persons. This, in turn, leaves the State under which jurisdiction the applicants find themselves, responsible for ascertaining that a rejection or an expulsion will not be to the contrary of the 1951 Convention, the CAT, ICCPR nor customary international law. As such investigative procedures necessitate disembarkation, the coastal State is by all practical means obliged to allow disembarkation and temporary refuge, until the individual asylum claim is disproven by official procedures conducted.³¹²

The observations made in this dissertation are relevant to both the present and future protection of refugees and asylum seekers. First, they illustrate the some of the

³¹¹ See Chapter 4, Section IX.

³¹² Kälén, Caroni & Heim op cit (n280) para 87.

developments of legal obligations to share the burdens of refugees in a regional context. The adoptions of regional legal instruments, which seek to distribute the burdens resulting from forced displacement, can in turn increase the protection of refugees as more resources are made available to the countries which due to geographical location happen to receive disproportionate numbers of asylum seekers. Secondly, the growing application of the ‘third safe country’ concept has been showed to constitute a serious risk to the fundamental principle of *non-refoulement*. States engaging in this practice must, in order to avoid violations of international refugee and human rights law, take precautions by individually assessing the risks of the individual transfer. Thirdly, the punitive and reparative means that restitution and compensation constitute, might prove as effective means to halt the creation of refugees, while simultaneously providing the injured parties with much needed pecuniary support. Fourthly, this dissertation has shown how the principle of *non-refoulement* leads to an obligation for assessing the well-founded fear of the individual rescuee, an obligation which is tantamount to a responsibility for the rescuing or interdicting State to determine refugeehood.

As the research of this dissertation have been limited to a selection of questions within the sphere of burden-sharing in refugee law, there are still many questions left unanswered in regard to the future of burden-sharing. This dissertation has, however, added weight to the notion that increased responsibility- and burden-sharing is imperative for the increased availability of adequate protection for refugees.

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